

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

October 29, 2010

- I. **ATTENDANCE** - The Vice-Chair called the meeting to order at 1:00 p.m. in the Council Chambers, 200 East Main Street, on October 29, 2010.

Members present were Vice-Chair Kathryn Moore, Thomas Glover, James Griggs, Jan Meyer and Barry Stumbo. Chairman Louis Stout and member Noel White were absent. Others present were Jim Hume, Mark Newberg and George Dillon of the Division of Building Inspection; Chuck Saylor of the Division of Engineering; Jim Gallimore of the Division of Traffic Engineering; and Rochelle Boland of the Law Department. Planning staff members in attendance were Bill Saltee, Jim Marx and Wanda Howard.

- II. **APPROVAL OF MINUTES** - The Vice-Chair announced that the minutes of the June 25 and July 30, 2010 meetings would be considered at this time.

Action – A motion was made by Mr. Stumbo, seconded by Mr. Griggs and carried unanimously (Stout, White absent) to approve the minutes for the June 25 and July 30, 2010 meetings.

III. **PUBLIC HEARING ON ZONING APPEALS**

- A. **Sounding the Agenda** - In order to expedite completion of agenda items, the Vice-Chair sounded the agenda in regard to any postponements, withdrawals, and items requiring no discussion.

1. **Postponement or Withdrawal of any Scheduled Business Item** - The Vice-Chair announced that any person having an appeal or other business before the Board may request postponement or withdrawal of such at this time.

- a. **A-2010-90: NCJPM PROPERTIES** - appeals for an administrative review to allow a sign that projects above the roof line and overhangs the building in a Neighborhood Business (B-1) zone, on property located at 1315 W. Main Street. (Council District 1)

The Staff Recommended: Disapproval, and that the decision of the Division of Building Inspection be upheld, for the following reasons:

1. The existing signage has elements that render it appropriately considered as a roof sign and/or as a freestanding sign that overhangs the building, both of which are prohibited by Article 17-5 of the Zoning Ordinance.
2. Granting the appeal would set a damaging precedent that would significantly change the manner in which signage on or over a roof is regulated in Fayette County, resulting in a clear circumvention of the intent of the Zoning Ordinance.
3. Numerous options are available for creative and unique signage, of the artistic character desired by the appellant, which would comply with the design, size and height allowances for signage within the Neighborhood Business (B-1) zone.

Representation – Mr. Martin Delker was present on behalf of the appellant to request a postponement of the subject appeal until the December meeting. There was no one present in opposition to the requested postponement.

Action – A motion was made by Ms. Meyer, seconded by Mr. Glover, and carried unanimously (Stout and White absent) to postpone **A-2010-90: NCJPM PROPERTIES** until the December 10 meeting.

- b. **V-2010-72: JAMES BAILEY** - appeals for variances to: 1) reduce the required side yard from 6 feet to 3 feet in order to construct a 2-story duplex; and 2) reduce the required parking from 4 to 3 spaces in a Two Family Residential (R-2) zone, on property located at 732 Whitney Avenue (Council District 2).

The Staff Recommended: Disapproval of the requested parking variance, for the following reasons:

1. The revised site plan submitted by the appellant, that proposes three off-street parking spaces, indicates that there is sufficient room for one additional parking space immediately to the rear of the proposed duplex. Providing that one additional space will bring the total number of parking spaces provided to four, which satisfies the minimum requirement of the Zoning Ordinance.
2. Based upon the previously submitted site plan, which showed four proposed parking spaces, it is clear that the intent of the appellant is to meet the minimum off-street parking requirements specified by the Zoning Ordinance, if possible. The request to reduce the required parking from 4 to 3 spaces resulted from concerns, based in part on input from the staff, that there may not be sufficient room to the rear of the duplex for the four required spaces, given the grade differences with the adjoining property.

The Staff Recommended: Approval of a 6' to 3' side yard variance (along the southeasterly side property line) for construction of a two-story duplex, for the following reasons:

- a. Granting such a variance will allow a new residence to be constructed with similar side yard setbacks as provided by the previously existing residence that was demolished a short time ago, along with a detached accessory building. Although the new residence will be closer to the southeastern property line, and further away from the northwestern property line, this change should not in any way pose a threat to the public health, safety or welfare, nor alter the character of the general vicinity.
- b. The narrow width of the lot (40') and the location of the former dwelling are special circumstances that contribute to justifying a reduction in the side yard requirement on at least one side of the lot.
- c. Strict application of the Zoning Ordinance would severely restrict the ability of the appellant to construct a reasonably sized residence, while at the same time leaving sufficient room to provide off-street parking to the rear or side of the dwelling, which is customary in this neighborhood.
- d. The appellant has been working diligently to redevelop the subject property in a manner that minimizes the number and extent of any variances that are required. Maintaining side yard setbacks comparable to what has been provided historically, for such a narrow lot, should not be viewed as an effort to circumvent a requirement of the Zoning Ordinance.

This recommendation of approval is made subject to the following conditions:

1. The proposed duplex shall be constructed in accordance with the revised site plan dated October 11, 2010, with the understanding that one additional parking space (8.5' by 18') shall be provided immediately to the rear of the duplex where the driveway begins to widen as it approaches the three designated parking spaces. That single space shall be sited to provide at least 3' of separation from the bottom of the exterior stairs at the rear of the duplex, and at least 9' of separation from the northwest side property line (for driveway clearance).
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.
3. As determined to be necessary, based upon a final determination of the size of the parking areas to be provided and an assessment of drainage conditions in the area, a storm water management plan shall be implemented in accordance with the requirements of the adopted Engineering Manuals, subject to acceptance by the Division of Engineering.
4. The basement shall be used for storage purposes only, and shall have a floor to ceiling clearance of less than 7'6".
5. Each unit of the duplex shall be limited to no more than two bedrooms.
6. The off-street parking areas to be provided shall be used for the parking of no more than four vehicles.

Staff Comment – Mr. Marx noted that Mr. Larry Morton, who was representing the appellant, wished to withdraw the portion of the appeal for a parking variance recommended for disapproval. He said Mr. Morton was agreeable to construct the required parking spaces (four in total), which would eliminate the need for that variance. No action by the Board regarding the withdrawal request was necessary.

2. No Discussion Items - The Vice-Chair asked if there were any other agenda items where no discussion is needed...that is, (a) The staff has recommended approval of the appeal and related plan(s), (b) The

appellant concurs with the staff's recommendations. Appellant waives oral presentation, but may submit written evidence for the record, (c) No one present objects to the Board acting on the matter at this time without further discussion. For any such item, the Board will proceed to take action.

Swearing of Witnesses - At this point, the Vice-Chair asked all those present who would be speaking or offering testimony on any case to stand, raise their right hand and be sworn. She administered the oath to a number of people.

ABBREVIATED HEARINGS:

- a. **V-2010-72: JAMES BAILEY** - appeals for variances to: 1) reduce the required side yard from 6 feet to 3 feet in order to construct a 2-story duplex; and 2) reduce the required parking from 4 to 3 spaces in a Two-Family Residential (R-2) zone, on property located at 732 Whitney Avenue. (Council District 2)

The Staff Recommended: Disapproval of the requested parking variance, for the following reasons:

1. The revised site plan submitted by the appellant, that proposes three off-street parking spaces, indicates that there is sufficient room for one additional parking space immediately to the rear of the proposed duplex. Providing that one additional space will bring the total number of parking spaces provided to four, which satisfies the minimum requirement of the Zoning Ordinance.
2. Based upon the previously submitted site plan, which showed four proposed parking spaces, it is clear that the intent of the appellant is to meet the minimum off-street parking requirements specified by the Zoning Ordinance, if possible. The request to reduce the required parking from 4 to 3 spaces resulted from concerns, based in part on input from the staff, that there may not be sufficient room to the rear of the duplex for the four required spaces, given the grade differences with the adjoining property.

The Staff Recommended: Approval of a 6' to 3' side yard variance (along the southeasterly side property line) for construction of a two-story duplex, for the following reasons:

- a. Granting such a variance will allow a new residence to be constructed with similar side yard setbacks as provided by the previously existing residence that was demolished a short time ago, along with a detached accessory building. Although the new residence will be closer to the southeastern property line, and further away from the northwestern property line, this change should not in any way pose a threat to the public health, safety or welfare, nor alter the character of the general vicinity.
- b. The narrow width of the lot (40') and the location of the former dwelling are special circumstances that contribute to justifying a reduction in the side yard requirement on at least one side of the lot.
- c. Strict application of the Zoning Ordinance would severely restrict the ability of the appellant to construct a reasonably sized residence, while at the same time leaving sufficient room to provide off-street parking to the rear or side of the dwelling, which is customary in this neighborhood.
- d. The appellant has been working diligently to redevelop the subject property in a manner that minimizes the number and extent of any variances that are required. Maintaining side yard setbacks comparable to what has been provided historically, for such a narrow lot, should not be viewed as an effort to circumvent a requirement of the Zoning Ordinance.

This recommendation of approval is made subject to the following conditions:

1. The proposed duplex shall be constructed in accordance with the revised site plan dated October 11, 2010, with the understanding that one additional parking space (8.5' by 18') shall be provided immediately to the rear of the duplex where the driveway begins to widen as it approaches the three designated parking spaces. That single space shall be sited to provide at least 3' of separation from the bottom of the exterior stairs at the rear of the duplex, and at least 9' of separation from the northwest side property line (for driveway clearance).
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.
3. As determined to be necessary, based upon a final determination of the size of the parking areas to be provided and an assessment of drainage conditions in the area, a storm water management plan shall be implemented in accordance with the requirements of the

- adopted Engineering Manuals, subject to acceptance by the Division of Engineering.
4. The basement shall be used for storage purposes only, and shall have a floor to ceiling clearance of less than 7'6".
 5. Each unit of the duplex shall be limited to no more than two bedrooms.
 6. The off-street parking areas to be provided shall be used for the parking of no more than four vehicles.

The Vice-Chair asked whether or not there were objectors present to the subject appeal. There was no response; therefore, photos of the subject property were not presented.

Representation – Mr. Larry Morton was present on the appellant's behalf. Vice-Chair Moore related her understanding that the parking variance had been withdrawn earlier. She asked if Mr. Morton had reviewed the conditions for approval and agreed to abide by them. Mr. Morton responded affirmatively.

Mr. Marx noted that Condition #4 would need to be amended, with regard to the floor to ceiling clearance height of the basement (from 7'6" to 7'), to be consistent with the KY Building Code. The amended condition was read as follows: The basement shall be used for storage purposes only, and shall have a floor to ceiling clearance of less than 7'.

Action – A motion was made by Ms. Meyer, seconded by, and carried unanimously (Stout, White absent) to approve **V-2010-72: JAMES BAILEY** – an appeal for a variance to reduce the required side yard from 6 feet to 3 feet in order to construct a two-story duplex in a Two-Family Residential (R-2) zone on property located at 732 Whitney Avenue, as recommended by the staff and subject to the six conditions, including the amendment of Condition #4 as noted herein.

Mr. Morton thanked the Planning staff and the Board for their assistance.

- b. **C-2010-83: BLUEGRASS MOJO, LLC** - appeals for a conditional use permit to provide live music as part of a restaurant operation in a Neighborhood Business (B-1) zone, on property located at 286 Southland Drive. (Council District 10)

The Staff Recommended: Approval (for individual performers), for the following reasons:

1. Granting a conditional use permit (restricted to individual performers) should not adversely affect the subject or surrounding properties. The provision of such live music should not be disturbing to any of the surrounding commercial uses; and the nearest residential properties are over 200' away, on the opposite side of an elevated railroad bed (to the west) and on the opposite side of Southland Drive (to the north).
2. All necessary public services and facilities are available and adequate for the proposed use.

This recommendation of approval is made subject to the following conditions:

1. Live music may be provided by individual performers that use either no or very limited amplification, such as typically used for an acoustical guitar.
2. The approval of this use is subject to the provision of an amended site plan that demonstrates compliance with off-street parking requirements. Seating at the restaurant may be adjusted accordingly, to accommodate less than 140 persons if necessary, in order to comply with Article 8-16(n) of the Zoning Ordinance.
3. An occupancy permit shall be obtained from the Division of Building Inspection prior to providing live music at this location, subject to verification that minimum off-street parking requirements will be satisfied.
4. Live music may be provided from 8:00 PM until midnight.
5. Live music shall be confined to the stage area depicted on the submitted site plan (NW corner of building), and shall not be provided (either in person or via speakers) at the outdoor patio.
6. The building shall be soundproofed to the maximum extent feasible using existing technology, in accordance with the requirements of the Division of Building Inspection.
7. All exterior doors shall remain closed (except for ingress/egress) when music is being provided.
8. The establishment shall be operated at all times in a manner that does not result in noise or other emissions creating a disturbance to the surrounding neighborhood.
9. This conditional use shall be considered null and void should the appellant cease to either

own or occupy the subject property.

The Vice-Chair asked whether or not there were objectors present to the subject appeal. There was no response; therefore, photos of the subject property were not presented.

Representation – Mr. Steven Atkins was present representing the appellant.

Ms. Moore noted that this case was continued from last month, at Mr. Atkins' request, to allow him to meet with interested neighbors to discuss the proposal to provide live music as part of the restaurant operation on Southland Drive. She asked whether the issues of concern had been resolved. Mr. Atkins responded affirmatively.

The Vice-Chair then asked whether Mr. Atkins had reviewed the conditions and agreed to abide by them. Mr. Atkins said he had reviewed the conditions and was in general agreement with them; however, he wanted to discuss the possible modification of Condition #1 (individual performers using limited amplification) and Condition #4 (ending the live music venue at midnight). He asked the Board to be allowed to offer live music performances until 1:00 a.m. He noted the letters of support they brought from the WPGL (Goodrich) Neighborhood Association, the Hill 'N Dale Neighborhood Association, the Southland Association and the Good Foods Co-op, as well as supporters who would speak about the type of atmosphere and upscale appeal the restaurant/bar provides that differentiates it from the two tenants who operated previously at this site.

Ms. Meyer asked whether Mr. Atkins had discussed the type of music to be provided and the amount of amplification with the neighborhood residents that attended the meeting noted earlier. Mr. Atkins responded that they had discussed this with the neighborhood associations. He said their concept would be to highlight a variety of music genres that included blues, bluegrass, folk and jazz, or the kind of music that does not have heavy bass, like hard rock, punk and heavy metal. He went on to say that a lounge-type atmosphere will be provided; and the genre of music wouldn't be such that guests have to raise their voices to converse and/or be heard.

Mr. Griggs noted some confusion at last month's BOA meeting due to a misunderstanding about the music being provided outside the building, rather than on an indoor stage; and he was glad to hear that was cleared up. Mr. Atkins responded that there was never any intention on their part to offer music outside, because it would create an undesired nuisance.

In response to the Vice-Chair, Mr. Marx said, based on the support from the surrounding neighborhood, the staff was fine with deleting Condition #1 entirely and revising Condition #4 to reflect that the live music venue would cease at 1:00 a.m. instead of midnight.

Referring to the staff report, Mr. Stumbo asked whether adequate parking to support the restaurant seating was being provided. Mr. Marx responded that the initial application made reference to seating for 140 persons; and based on the site plan originally submitted, the parking fell a little short. He said the applicant would have to do something about the parking if they wanted to get an occupancy permit for the 140-person seating. Mr. Cameron Morgan (restaurant co-owner) responded that the parking lot recently had been re-stripped and resealed; and as the letter from the contractor (Larkin group) they hired stated (of which a copy was furnished), 58 parking spaces are actually available for customer use. He noted the revised site plan showing 58 parking spaces.

Ms. Moore asked if the deletion of Condition #1 meant there would be no limit to the music and the noise. Mr. Marx responded that typically, Condition #1 for example, if it is not restrictive, would have wording such as "approval in accordance with the submitted application." He said, if the Board desired, Condition #1 could be left in and adjusted that way. Ms. Moore then asked counsel for any suggestions on amending Condition #1 or deleting it altogether. Ms. Boland responded that she didn't think we typically have such restrictions when you have this kind of spacing from a residential zone; and so, it's kind of an optional thing. She said you (the Board) could possibly refer to limited amplification based on the testimony here that it's not going to be loud enough to prohibit conversation within the establishment; but it would be extremely difficult for Building Inspection to try to enforce something like that. Ms. Boland noted that there is a general noise ordinance that would be applicable, in the event that the noise starts leaking outside the building to the point where it is bothering the neighbors.

Since there were no further comments or discussion, Ms. Moore asked for a motion.

Action – A motion was made by Mr. Griggs, seconded by Mr. Stumbo, and carried unanimously (Stout, White absent) to approve **C-2010-83: BLUEGRASS MOJO, LLC** – an appeal for a conditional use permit to provide live music as part of a restaurant operation in a Neighborhood Business (B-1) zone on property located at 286 Southland Drive, based on the staff's recommendation and subject to the listed conditions, including the deletion of Condition #1 and the amendment of Condition #4, as follows:

4. Live music may be provided from 8:00 PM until 1:00 AM.

- c. **C-2010-96: CHRIST THE KING CATHOLIC CHURCH** - appeals for a conditional use permit to expand the church (chapel and rectory) in a Single-Family Residential (R-1C) zone, on property located at 299 Colony Boulevard. (Council District 5)

The Staff Recommended: Approval, for the following reasons:

1. Granting the requested conditional use permit should not adversely affect the subject or surrounding properties. The proposed additions will improve the facilities and services provided by this well established church. Current levels of off-street parking will be maintained, and activities associated with the adoration chapel and the rectory are not anticipated to be disturbing in any way.
2. All necessary public facilities and services are available and adequate for the proposed use.

This recommendation of approval is made subject to the following conditions:

1. The adoration chapel and rectory shall be constructed in accordance with the submitted application and site plan.
2. The final design of the reconfigured parking areas and traffic aisles shall be subject to review and approval by the Division of Traffic Engineering.
3. A storm water management plan shall be implemented in accordance with the requirements of the adopted Engineering Manuals, subject to acceptance by the Division of Engineering.
4. An outdoor play area of at least 2,475 square feet in size shall be provided, to be fenced and screened in accordance with the requirements of the Division of Building Inspection. This area shall be open and available for use prior to the initiation of any construction activity for the proposed rectory.

The Vice-Chair asked whether or not there were objectors present to the subject appeal. There was no response; therefore, photos of the subject property were not presented.

Representation – Mr. Matt Carter, engineer with Vision Engineering, was present on the appellant's behalf. When asked, he indicated that they understood and agreed to abide by the conditions for approval.

Action – A motion was made by Mr. Stumbo, seconded by Ms. Meyer, and carried unanimously (Stout, White absent) to approve **C-2010-96: CHRIST THE KING CATHOLIC CHURCH** – an appeal for a conditional use permit to expand the church (chapel and rectory) in a Single-Family Residential (R-1C) zone on property located at 299 Colony Boulevard, for the reasons listed by staff and subject to the four conditions.

- d. **C-2010-97: THE LEXINGTON HEARING AND SPEECH CENTER, INC.** - appeals for a conditional use permit to establish a school and child care facility for the hearing impaired in a Single-Family Residential (R-1C) zone, on property located at 350 Henry Clay Boulevard. (Council District 5)

The Staff Recommended: Approval, for the following reasons:

1. A specialized school for the hearing impaired, to include child care facilities, at this location should benefit the community, and not adversely affect any of the surrounding properties. An existing building, formerly used for a public elementary school, will be used, without the need for any expansion or major exterior renovations. Adequate off-street parking is already available, and an existing circle drive at the front of the building will continue to function as a drop-off and pick-up location for children and students. All of the outdoor play and recreation areas will be preserved, which should benefit the neighborhood and help to buffer adjoining residential properties.
2. All necessary public facilities and services are available and adequate for the proposed uses.

This recommendation of approval is made subject to the following conditions:

1. The facility shall be established in accordance with the submitted application and site plan, with the understanding that children from the age of six weeks through elementary school age may be accommodated.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to any renovations or occupancy of the building.
3. Enrollment in the school/child care shall be managed for the facility as a whole to ensure that minimum off-street parking requirements are satisfied based on a total of 87 off-street parking spaces being available. Any redesign or re-striping of this lot shall not decrease the number of spaces below 87 and shall be subject to the review and approval by the Division of Traffic Engineering.
4. A minimum of 25 square feet of outdoor play area shall be provided for every child that is enrolled in the school/child care, to be fenced and screened in accordance with the requirements of the Division of Building Inspection.
5. The facility shall be established and maintained at all times in compliance with any applicable requirements of the Kentucky Cabinet for Health and Family Services.
6. Any new outdoor pole lighting for the parking lot shall be at a pedestrian scale, or of a shoebox (or similar) design, with light shielded and directed downward to prevent any disturbances to adjoining properties or nearby residents.
7. Outdoor activities, including special events, shall not be undertaken that involve either the use of fireworks, or the placement of portable toilets on the subject property for more than 48 hours.
8. All outdoor activities shall end by 9:00 PM, and no more than one outdoor speaker and no amplification systems are allowed, unless the activity is jointly sponsored by the center and the Fairway Neighborhood Association.
9. All trees with a caliper of 8" or greater shall be preserved, unless determined by the Urban County Forester to be diseased or a health or safety risk.
10. Except for the gymnasium after hours, the property and portions of the existing building shall not be leased to a third party.

The Vice-Chair asked whether or not there were objectors present to the subject appeal. There was no response; therefore, photos of the subject property were not presented.

Representation – Mr. Richard Murphy, attorney, was present representing the applicant. He also introduced Mr. King Offutt, Board Chairman; Ms. Lori Shepherd, Executive Director; and Mr. Matt Carter, engineer with Vision Engineering. Mr. Murphy said they were generally in agreement with the conditions recommended for approval by the staff, with a few modifications. He said the school was moving to a new location in order to have more space and, eventually, to be able to provide an elementary school (first, second and third grades) for children who were not yet ready to enter the mainstream. The school currently goes through kindergarten.

Mr. Murphy spoke about the proposed revisions to three of the 10 conditions for approval, which were shown on the overhead projector. Condition #5 currently stated that the applicant would comply with the regulations of the KY Cabinet for Health and Family Services. Mr. Murphy noted that they were actually governed by three or four state agencies and proposed the following revision to Condition #5:

"5. The facility shall be established and maintained at all times in compliance with any applicable State requirements."

Regarding Condition #8, Mr. Murphy said they didn't anticipate (having) a lot of outdoor activities; and the Fairway Neighborhood Association is voluntary, and they didn't want to discriminate against one association or another. Therefore, the following revision to Condition #8 was proposed:

"8. All outdoor activities shall end by 9:00 p.m."

It was noted by Mr. Murphy that they would comply with the Noise Ordinance.

Ms. Moore asked if they were objecting to the provision of no more than one outdoor speaker and no amplification systems. Mr. Murphy responded that they preferred to have the condition amended as proposed, noting that this is a school for the hearing impaired, and they would not be doing anything to create a noise disturbance.

Mr. Griggs said he thought it was wonderful that there was no opposition from the Fairway Neighborhood Association. However, he wondered whether the lack of any opposition may have

been due, in part, to what the condition in question originally stated (i.e., no amplification systems and no more than one outdoor speaker); and if it would be unfair to the supporters to strike the remainder of the condition as proposed. Mr. Murphy responded that Mr. Offutt had met with the neighborhood association and indicated to them that the conditions were not finalized. In that regard, he didn't think it would be unfair to any organization or that this would be overly taking advantage of anyone.

Mr. Offutt stated that the Lexington Hearing and Speech Center had been in operation for 50 years and is currently located on North Ashland Avenue less than a mile away from the existing school building. He said they have never received a complaint of any kind from the neighborhood residents; and they just wanted to simplify the condition in question.

Ms. Moore asked if they had ever used an outdoor speaker or amplification system. Mr. Offutt responded that they had not after 9:00 p.m. He recalled one event during Halloween where a bullhorn was used to organize play group activities for the children.

Mr. Griggs wondered why the condition was objectionable if they didn't use an amplification system and a bullhorn was only used occasionally. Mr. King responded that he thought a bullhorn was an outdoor amplification system, and stated that if they wanted to have some activity that was going to end before 9:00 p.m. and otherwise be in compliance with the Noise Ordinance, he didn't understand the need to impose a condition in excess of those limitations. He said that they were not going to have outdoor rock concerts at this location.

Ms. Moore asked why this condition was proposed in the first place.

Mr. Murphy related to the Board that the president of the neighborhood association was present and, to his understanding, did not have an objection to the way the condition was worded.

Ms. Valerie Askren, president of the Fairway Neighborhood Association, stated that they were excited about Lexington Speech and Hearing coming into the neighborhood; and in general, they were very supportive of what the school was doing. She said, until late this morning, they were under the assumption that there would not be amplification; and one thing she thought might be a compromise was to prohibit amplification after 9:00 p.m., because the back of the school where outdoor activities would be held is immediately adjacent to a residential area with almost no buffer zone. She said they understood that periodically, the school might want to have outdoor events, and the neighbors wanted to be supportive in terms of the spirit of supporting the school; however, they didn't want the amplification to be overly burdensome on the residents living adjacent to the school property.

Ms. Moore related her understanding that there was no objection to amplification as long as it ended by 9:00 p.m. Ms. Askren responded that was correct; and said she thought this was a reasonable compromise. Mr. Griggs agreed, as that's what the condition initially required.

Ms. Moore said they won't have amplification when they're not having outdoor activities; and if outdoor activities end at 9:00 p.m., there's certainly not going to be amplification. Mr. Murphy said they were in agreement with that, because the original condition was a little unclear; and that they agree to no amplification after 9:00 p.m.

Ms. Moore asked if Mr. Marx had any comments. Mr. Marx said, in response to the question Ms. Moore asked earlier, that this condition was, to a large extent, a carryover from the previous church application where there were several conditions recommended by the neighborhood; and that the staff kind of wrestled with those and recommended some thought to be the most appropriate.

Mr. Glover said he thought Mr. Murphy's comment that this is a hearing and speech center was probably an appropriate comment. Mr. Murphy added that they didn't generally anticipate it would become an issue, as Mr. Offutt mentioned though, they do use a bullhorn or something for some occasional outdoor events. He said they would rather not be precluded from any amplification such as that. He assured the Board that this was not going to be an issue in the neighborhood; and they did agree to no amplification after 9:00 p.m., in order to put everyone's mind at ease.

Continuing, Mr. Murphy addressed the proposed revision of Condition #10. He said the condition currently states that neither the property nor portions of the building can be leased to a third party. As a result of having discussed this with staff, he proposed the following revision (which was

shown on the overhead): Except for the gymnasium after hours, leasing of the property or portions of the existing building for other programs shall require Board of Adjustment approval.

At this point, Mr. Murphy made one last request. He said they had applied for a school, kindergarten, preschool and child care, which was stated on the refusal issued by Building Inspection; however, it is listed on the agenda as a school for the hearing impaired, which he asked to be removed when a motion is made. He explained that there were siblings of the hearing impaired children who also attend the school, as well as speech impaired children without a hearing impairment and other children who are not related acting as speech models.

Ms. Moore commented that she was certainly supportive of the Lexington Hearing and Speech Center and in trying to keep the former school building as it is; but given what happened with a past applicant, her concern was how eventually there will be a legitimate school on this property as opposed to just a child care center. In response, Mr. Murphy said there were two ways to explain this: 1) the first grade will be added immediately when they come in, and that is because, they will be doing that gradually because students get diagnosed with hearing problems, a lot of them at birth now because there's a KY statute that requires hearing testing at birth. However, some students' hearing impairments are identified later, such as when they're 3 or 4. He said the goal of the Lexington Hearing and Speech Center has always been to mainstream their students into the Fayette County school system as quickly as possible, but many children are not ready to do that when they graduate from kindergarten. It had been a very regrettable situation for this agency for a number of years that when a child graduates, they had to have the parents come and ask to attend first and second grade there. Often, the school had to say they didn't have room and told the parents to make some other arrangement. Now, they hope to add the first grade, and subsequently, the second and third grades as needed for those students who need the additional speech pathology or hearing aid/audiology assistance offered. Then, the elementary school will be established for them. He said the quick answer is, yes, they will be establishing an elementary school, which is anything above first grade, on the premises. He said they do not anticipate that the elementary school will ever be the majority of the students, because the mission is to get students to the point where they can mainstream into the Fayette County Public Schools.

Mr. Murphy pointed out that, from his personal observation one week prior, that there was a lot more academic content, even to the preschool, than there was in a typical preschool, because these children had to have intensive instruction and treatment for audiology services, speech pathology, and the like. Since they have a lot of one-on-one time with speech pathologists and other people, even in the preschool, they are getting academic content in their treatment and in their program which is not available at a typical preschool or child care center.

Mr. Murphy said in 1983, their facility was approved for North Ashland Avenue by the Board as a school even though at that time there was no elementary school (first, second or third grade). He felt that part of that was recognition of the special programs offered at the Lexington Hearing and Speech Center. He reiterated that they will have a school that is licensed through the State as an elementary school with all the academic programs that are required for first, second and third graders, but more importantly, they would have an academic content that goes below that to the 3 and 4 year olds in the preschool program. It was mentioned that some audiology services are provided for people who are not students of the school (including adults), which is mostly for alumni and families. He said this was discussed with the staff and with Building Inspection in the beginning, and they agreed that it was a minor part of this usage, which would be continued at the new site.

Ms. Moore said there was a question as to whether clarification was needed for Condition #8. She said it seemed to her that, to the extent that the neighborhood doesn't object to amplification before 9:00 p.m., there's no need to include anything (else) and just say all outdoor activities shall end by 9:00 p.m.

Action – A motion was made by Mr. Glover, and seconded by Mr. Stumbo to approve **C-2010-97: THE LEXINGTON HEARING AND SPEECH CENTER, INC.** – an appeal for a conditional use permit to establish a school and child care facility in a Single-Family Residential (R-1C) zone on property located at 350 Henry Clay Boulevard, as recommended by the staff and subject to the 10 conditions, including the following revisions as recommended by the Board and Mr. Murphy:

5. The facility shall be established and maintained at all times in compliance with any

- applicable State requirements.
8. All outdoor activities shall end by 9:00 PM.
 10. Except for the gymnasium after hours, leasing of the property or portions of the existing building for other programs shall require Board of Adjustment approval.

The votes were as follows:

Ayes: Meyer, Griggs, Glover, Stumbo

Nay: Moore

Absent: Stout, White

The motion for approval carried, 4 to 1.

Ms. Moore noted that she, in all good conscience, voted against the motion because she didn't believe this use was primarily a school.

- B. **Transcript or Witnesses** - The Vice-Chair announced that any applicant or objector to any appeal before the Board is entitled to have a transcript of the meeting prepared at his expense and to have witnesses sworn.
- C. **Variance Appeals** - As required by KRS 100.243, in the consideration of variance appeals before the granting or denying of any variance the Board must find:

That the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the Board shall consider whether:

- (a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;
- (b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and
- (c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

The Board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulations from which relief is sought.

1. **V-2010-101: HUGH JASS BURGERS, LLC / ELLISTON PROPERTIES, LLC** - appeal for a variance to reduce the required front yard from 20 feet to 0 feet in order to install an open-air fabric awning over an existing patio in a Neighborhood Business (B-1) zone, on property located at 393-395 South Limestone. (Council District 3)

The Staff Recommended: Approval of a variance reducing the required front yard from 20' to 12' along South Limestone and from 20' to 0' along Winslow Street, for the following reasons:

- a. Granting such a variance should not adversely affect the public health, safety or welfare, nor degrade the character of the general vicinity. With a 12' front yard on South Limestone, an awning patio cover would align with the outer edge of the building on the adjoining property to the north, and would be more in keeping with the character of the two blocks of South Limestone between Winslow Street and West Maxwell Street.
- b. The two blocks of South Limestone between Winslow Street and West Maxwell Street have a number of eating establishments with outdoor seating areas that have umbrellas or other types of cover. An awning cover with a 12' front yard setback would be compatible with those features and would complement the established streetscape.
- c. Strict application of the Zoning Ordinance would permit just a 10' deep covered area, which would have relatively limited utility and would provide sun and rain protection for only about 1/3 of the new patio area for this establishment.
- d. In light of the manner in which this urban streetscape has been developed, a 12' front yard along South Limestone and a 0' front yard on Winslow Street for an awning cover is reasonable and would not result in a circumvention of the intent or requirements of the Zoning Ordinance.

- e. The circumstances surrounding a moderate front yard reduction on South Lime, from 20' to 12', can reasonably be interpreted as not resulting from the actions of the appellant. The recent replacement of the old wooden deck with a masonry patio is authorized by the previous variance approved by the Board on June 30, 2006 (V-2006-67: AKAMU Enterprises, LLC).

This recommendation of approval is made subject to the following conditions:

1. The awning cover shall be erected in accordance with a revised site plan indicating a minimum front yard of at least 12' on South Lime to be provided.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.
3. The variance is granted only for the purpose of installing a patio cover, and shall not be used to accommodate any other type of building addition.

Representation – Mr. Nick Nicholson, attorney, was present on the applicant's behalf, along with Ms. Alison Grimes. A handout was distributed to the Board.

Ms. Moore asked if Mr. Nicholson was in agreement with the staff's recommendation. Mr. Nicholson responded that they were in substantial agreement with the recommendations of the staff; however, there was an issue with respect to the extent of the variance. He said they were requesting a full variance along the South Limestone side of the property from 20 feet to 0 feet, rather than 20 feet to 12 feet as the staff recommended.

Mr. Nicholson displayed a photo of the building, and photos of adjacent businesses and streetscape were shown on the overhead (Exhibit 1). In review, Mr. Nicholson said they were last before the Board in July with an identical variance request; and that a motion was made to approve the requested variance that ended in a tie vote, which was the equivalent of no action being taken by the Board. That tie vote allowed the variance appeal to be brought back. He said they felt that an awning over the existing patio would not adversely affect the health, safety and welfare of the public, nor would it degrade the character of the general vicinity. Further, the circumstances that led them to have to ask for the variance were not a result of the applicant's actions, but rather the prior building owner and tenant, whose request led to the existence of the patio.

Mr. Nicholson said only 10 feet of the 30-foot patio would be covered by the awning they wished to install; and that strict application of the Zoning Ordinance was just not appropriate. He said they had made substantial capital improvements to the patio and the building's interior and exterior as well in opening this restaurant; and they were respectfully requesting a full variance in order to allow for an open-air fabric canopy that would extend the entire length of the existing patio.

Mr. Nicholson stated that Hugh Jass Burgers is a new tenant at this location, having inherited a lease from the prior tenant. Some previous tenants that had operated at this site were named, including La Bamba's, Jersey Mike's, and Salottos. He spoke about the applicant's efforts to enhance the subject property in conjunction with the newly renovated South Limestone streetscape; the popularity of the sit-down restaurant with a family-friendly environment; and providing an awning over the patio to protect the restaurant's patrons and bring more of a street presence. A photo was shown to illustrate the view of the proposed awning from the front (Exhibit 4) and side (Exhibit 5) of the building.

Mr. Nicholson argued that the proposed awning would be in keeping with the South Limestone streetscape, which has similar awnings and permanent roofs for outdoor seating areas, and would not alter the character of the general vicinity. In point, reference was made to the awning of the adjacent Pazzo's restaurant that extends from the patio in front of the building to the zero marker of the sidewalk (Exhibit 11); the Kennedy Book Store that has a hard canopy to protect its customers and extends to the sidewalk (Exhibits 7 and 8); and Two Keys Tavern that recently completed a renovation which included a hard roof-like awning that extends to the zero marker of the sidewalk.

Mr. Nicholson said they are asking for what their neighbors currently have -- an awning that extends to the zero marker of the sidewalk. Referring to Exhibit 5, he argued that the proposed awning would not block the view of the business uses along either South Limestone (heading north) or Winslow, nor would it impose on the streetscape, the right-of-way or the sidewalk. He reiterated that what they were requesting was similar to what the Hyatt has done with the "Bigg Blue Martini", as views of the fabric awning illustrate in Exhibits 16–19.

Referring to the illustration in Exhibit 6, Mr. Nicholson stated that the variance recommended by staff, from 20 feet to 12 feet along South Limestone, was an inappropriate stopping point for the proposed awning because: 1) the building is set back farther from South Limestone than other businesses in the vicinity,

and installing an awning with a 12-foot variance would bring more attention to the difference in the setback of the neighboring buildings; 2) stopping short at the 12-foot mark would ruin the visual and aesthetic consistency the applicant is striving for with the patio and awning; 3) the combination of an awning and umbrellas for the remainder, as recommended by the staff, would create congestion as well as a visual barrier; 4) installing an awning with a 12-foot variance, as recommended by the staff, would require a new support pole that would not be aesthetically pleasing; and 5) a lesser variance than requested would create a hardship that would prohibit the applicant from making full use of the patio. Mr. Nicholson noted, with regard to the parking between Pazzo's and Hugh Jass Burgers, that driver visibility would be impaired by the umbrellas (raised or not) and the awning when backing out of that parking area.

Mr. Nicholson referred to Exhibit 9, a photo showing a view from the patio on the subject property back toward the block where the Kennedy Book Store is located. He said the photo illustrated that the applicant's patio is directly in line with the awning of the book store. He noted other business uses in the vicinity that, like the applicant's property, are right on the zero setback line, such as Pazzo's, Jimmy John's, Special Media, McDonald's and Two Keys. Mr. Nicholson felt that the awning they wished to have, extending all the way out to the street, would fit in and make the restaurant a vibrant addition to this corridor. He respectfully requested that the Board modify the staff's approval recommendation to allow for a zero setback as opposed to a 12-foot variance.

Questions – Mr. Glover asked whether or not the awning would be permanent. Mr. Nicholson responded that it would be permanent, for year-round use.

Referring to the illustration of the proposed awning that was presented, Ms. Meyer said she understood the reason for the applicant not wanting the awning to stop where the staff recommended, because, visually, it didn't line up well with the pillars that were put in. She asked if possibly extending the awning out to the pillars, making it more visually appealing, was discussed with the staff; and whether the staff was amenable to that (request). Mr. Marx responded that that possibility was discussed recently with the staff. He explained that part of the reason why the staff didn't get into that initially was because they were surprised that the applicant went to the expense of constructing the pillars on the deck, without any certainty as to whether the awning was going to get approved; and that the staff tried to ignore that fact initially. However, he said the staff did not have a problem with another two to three feet so that the support columns for the awning could utilize the brick pillars. He said that they were agreeable to that.

In response, Mr. Nicholson said it was his understanding that the pillars were to be placed above the previous deck, and that is the reason for this request, as filed. They had previously replaced the rotten wood and installed the support columns at the same time. The foundation for the patio was left as it was. He said while they request the full variance, a 9' setback would be more amenable to his client when compared to the 12' setback recommended by the staff.

Ms. Moore noted one letter of objection had been circulated to the Board. She asked if anyone was present to object to this request.

Objector – Mr. Jack Stewart, Stewart Architecture, Kentucky Avenue, was present to object to this request. He distributed two documents to the Board at this time. The first was a letter of objection from the Historic South Hill Neighborhood Association. The second was a statement of concern, signed by eight commercial property owners adjacent to and in vicinity of the subject property. Mr. Stewart said that there is no satisfaction with these groups with the current proposal in any form. He said that it would not be in character with the other businesses on South Limestone Street.

Questions – Ms. Moore asked if there was objection to the staff recommendation for approval of a variance to a 12' setback. Mr. Stewart replied affirmatively, saying it would not be as attractive as other improvements in this commercial area.

Mr. Glover said that one of the objections mentioned in one of the letters was that the front of the building in question was rounded, but the proposed awning was not. He asked if that was objectionable, to which Mr. Stewart replied that the radius of the awning would be problematic.

Mr. Glover asked if all of the awnings in the area had received variances. Mr. Nicholson replied that they had not. He said that when the prior owner of this property received a variance to construct the deck, there was a condition that there would be no roof over the deck. He said that Building Inspection determined that any covering of the deck would require action by the Board.

Mr. Glover asked why that condition was originally placed on the deck. Mr. Stewart responded that it involved a variance in the front yard, and that only an 8' projection was ordinarily permitted by the Zoning Ordinance in front of the front building wall, and did not apply to the entire distance or extent of a deck approved at a zero-setback. He said that this design is very subjective, and the collective statement of the neighborhood is that the proposed awning is not aesthetically pleasing, it would be distracting, and it would not meet the standards set by other area business owners. While he acknowledged the improvements made to the building by this property owner, he said no one was interested in seeing this constructed on the subject property.

Mr. Glover asked why the awning was not up to the area's standards. In reply, Mr. Stewart offered that it was to be made of canvas, or another fabric, and thus, it was temporary and not a true architectural feature. He said that if it were then enclosed, it could then be even worse. Mr. Glover asked if it were more substantial, would it be less objectionable. Mr. Stewart replied that it would in his opinion, but he could not speak for the other listed objectors.

Mr. Stumbo noted that Mr. Nicholson stated earlier that they would be willing to modify their request to setback the awning at the 9' mark, and asked Mr. Stewart if he objected to any canopy being installed in front of this building. Mr. Stewart replied that that was the position of the objectors. Mr. Stumbo said he did not believe this was a reasonable position. Mr. Stewart replied that a fabric canopy on a small aluminum frame was not an acceptable design for this property improvement, as it would not be substantial. Mr. Stumbo asked if the objections would remain if the canopy were more aesthetically pleasing. Mr. Stewart replied that that was their hope.

Rebuttal – Mr. Nicholson said the appellant was requesting exactly what their neighbor had, as their canopy was to be installed by the same company that installed the canopy in front of Pazzo's. He felt that a more visually imposing structure on the front of the subject building would be less appealing to the area. He said that the fabric awning proposed is in keeping with others in this area. Pazzo's, Kennedy's Book Store and the Two Keys Tavern all had existing canopies out to a 0' setback, and they were requesting the same.

Discussion – Mr. Stumbo asked if there were any future plans to enclose this deck. Mr. Nicholson replied that there were no such plans to his knowledge.

Mr. Hume asked if there would be any signage proposed on the awning in question. Mr. Nicholson replied in the negative. Mr. Hume said that if the awning were to be retractable, then this application would not currently be before the Board.

Mr. Glover asked how the Board could determine what was "aesthetically pleasing." Mr. Nicholson concurred.

Ms. Moore said one objective difference in this request was that this was a really big awning. While the others were placed at a 0' setback, this canopy would be much more than 20' in front of the building. Mr. Nicholson agreed, and said that this is partially the reason that so many tenants had failed in this space. This building was significantly setback from the street, so pedestrians were not ordinarily drawn to that building. He felt that this awning would help provide a "street presence" of people eating and congregating at this location.

Ms. Moore asked if the use of umbrellas at tables would have the same effect. Mr. Nicholson replied that umbrellas would clutter the patio area and cause "visual congestion, for lack of a better term."

Mr. Glover asked about the other existing businesses in the subject building. Mr. Nicholson replied that the building had three tenants, including Tolly Ho and e-Campus, both of which were in support of this request. The next adjacent building housed Pazzo's, which had a front awning at the 0' setback. Mr. Glover asked if their support included the ability for the awning in question to block their wall signs and window advertising. Mr. Nicholson replied that they had given their support for this request, and said that their signs would still be visible, as shown in Exhibit #3 in their submitted packet.

Ms. Moore asked if those two businesses were tenants of the appellant. Mr. Nicholson replied affirmatively, but said that Tolly Ho planned to move to the old Hart's Laundry building on South Broadway in the near future.

Mr. Griggs asked Mr. Hume if a variance for a patio covering would also allow it to be enclosed, at will. Mr. Hume replied that it would, unless it was specified otherwise as a condition of the Board's approval.

Mr. Glover was unsure as to how to proceed. He said that, were he an architect, this would not have been his design. Still, he did not want to unnecessarily restrict the private property owner in this case. He said the proposed awning didn't seem to be in keeping with the curved front corner of the building, and he asked the staff if the proposed compromise (discussed for the awning to be supported by one of the columns) would be acceptable. Mr. Marx replied that the current estimate was for a 9' setback to that nearest column, and that would result in it being 3' closer to the street than the staff recommendation. He said the staff would support the existing pillars being used to support the awning at a 9' setback from the street.

Ms. Moore asked if the 12' setback would be in line with the Pazzo's building. Mr. Marx agreed, and added that the 9' setback discussed would be not as close as the Pazzo's awning is to the street.

Mr. Stumbo asked Mr. Nicholson if the appellant would be willing to compromise in this instance. Mr. Nicholson said it would be their desire to extend the awning to the street, but they would be willing to accept the 9' setback compromise in the alternative.

Ms. Moore asked that an additional condition be considered to keep the awning from being enclosed without having to come back to the Board.

Mr. Stewart said that the prior references to Kennedy's and Two Keys were very different situations, as their canopy structures were substantial and not made of fabric.

Action – A motion was made by Mr. Stumbo to approve **V-2010-101: HUGH JASS BURGERS, LLC / ELLISTON PROPERTIES, LLC** – an appeal for a variance to reduce the required front yard from 20 feet to 9 feet in order to install an open-air fabric awning over an existing patio in a Neighborhood Business (B-1) zone, on property located at 393-395 South Limestone, for the reasons provided by the staff.

Discussion of Motion – Ms. Moore asked if any adjustments were needed to the staff's findings in order to approve this compromise. Ms. Boland replied that finding A needed revision, and suggested the following language in its place:

"a. ...With a 9' front yard on South Limestone, an awning patio cover would align between the outer edge of the building on the adjoining property to the north, and the awning on that building."

She suggested there is a need in the other findings and in the conditions to replace any reference to 12' with 9' to where they would read as follows:

- a. Granting such a variance should not adversely affect the public health, safety or welfare, nor degrade the character of the general vicinity. With a 9' front yard on South Limestone, an awning patio cover would align between the outer edge of the building on the adjoining property to the north, and the awning on that building.
- b. An awning cover with a 9' front yard setback would be compatible with those features and would complement the established streetscape.
- c. Strict application of the Zoning Ordinance would permit just a 10' deep covered area, which would have relatively limited utility and would provide sun and rain protection for only about 1/3 of the new patio area for this establishment.
- d. In light of the manner in which this urban streetscape has been developed, a 9' front yard along South Limestone and a 0' front yard on Winslow Street for an awning cover is reasonable and would not result in a circumvention of the intent or requirements of the Zoning Ordinance.
- e. The circumstances surrounding a moderate front yard reduction on South Lime, from 20' to 9', can reasonably be interpreted as not resulting from the actions of the appellant. The recent replacement of the old wooden deck with a masonry patio is authorized by the previous variance approved by the Board on June 30, 2006 (V-2006-67: AKAMU Enterprises, LLC).

This recommendation of approval is made subject to the following conditions:

1. The awning cover shall be erected in accordance with a revised site plan indicating a minimum front yard of at least 9' on South Lime to be provided.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.
3. The variance is granted only for the purpose of installing a patio cover, and shall not be used to accommodate any other type of building addition.

Mr. Glover asked how the 9' setback would be measured. Ms. Boland responded that it would be measured from the edge of the right-of-way to the edge of the awning.

Amendment to Motion – Mr. Stumbo said he was amenable to those revised findings and conditions offered by Ms. Boland, and would amend his motion accordingly.

Action on Amended Motion – Mr. Glover seconded the motion, and it carried unanimously (Stout and White absent).

D. Conditional Use Appeals

1. **CV-2010-95: GREEK ORTHODOX CHURCH** - appeals for a conditional use permit to construct and occupy a church with accessory parking; and a variance to allow parking within the required front and side street side yards in a Single Family Residential (R-1C) zone, on properties located at 3001 & 3005 Bates Creek Road (Council District 4).

The Staff Recommended: Approval, for the following reasons:

- a. Granting the requested conditional use should not adversely affect the subject or surrounding properties. A relatively small worship facility (up to 150 sanctuary seats) is to be constructed, so significant levels of traffic congestion are not anticipated. Adequate space has been retained for any storm water retention that may be required, and additional storm water management features appear to have been incorporated into the design of the facility. A continuous landscape buffer will be provided for the new parking lot, and along the rear of the property and the southerly side property line.
- b. All necessary public facilities and services are available and adequate for the proposed use.

The Staff Recommended: Approval of a variance to reduce the required front and side street side yards from 30' to 15' and 16', respectively, specifically for off-street parking, for the following reasons:

- a. Granting such a variance should not adversely affect the public health, safety or welfare, nor alter the character of the general vicinity. The visual impact of the proposed facility will be largely determined by the two proposed buildings, both of which will be located at least 125' back from Bates Creek Road, in alignment with existing buildings to the north and south. The actual layout of the parking lot will be similar in appearance and design to other existing church parking lots in the general area.
- b. The 125' platted building line is a special circumstance that has resulted in the need for the off-street parking areas to be situated in front of and to the side of the two church buildings that are to be constructed, which has caused those parking areas to be closer to Bates Creek Road and Rebecca Drive than what would have otherwise been necessary if buildings were located more centrally on the subject property.
- c. Strict application of the Zoning Ordinance would likely result in only the minimum required parking being provided for this church use, which might lead to unwelcome levels of on-street parking in the adjacent neighborhood.
- d. The appellant is making an effort to ensure that adequate off-street parking will be provided for this small church facility, with minimal impact to the surrounding neighborhood. That effort should not be interpreted as an attempt to circumvent a requirement of the Zoning Ordinance, as all of the required parking for the church is to be provided behind the 30' front yard and side street side yard required by the Zoning Ordinance for the R-1C zone.

This recommendation of approval is made subject to the following conditions:

1. The church facility and accessory parking areas shall be constructed in accordance with the submitted application and site plan, with the understanding that the two buildings may be constructed in phases.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction.
3. All of the parking areas and traffic aisles shall be paved, with spaces delineated and landscaped/screened in accordance with Articles 16 and 18 of the Zoning Ordinance.
4. The final design of the parking areas, traffic circulation and access points shall be subject to review and approval by the Division of Traffic Engineering.
5. The existing access off of Bates Creek Road shall be improved in accordance with the requirements of the Kentucky Transportation Cabinet.
6. Any outdoor pole lighting for the parking areas shall be of a shoebox (or similar) design, with light shielded and directed downward to avoid disturbing adjoining and nearby residential properties.
7. A storm water management plan shall be implemented in accordance with the adopted Engineering

- Manuals, subject to acceptance by the Division of Engineering.
8. Landscaping required by Article 18 of the Zoning Ordinance for the vehicular use areas shall be augmented along the rear and side property lines to provide a complete landscape buffer along that property boundary (a total distance of approximately 450', as adjusted to maintain sight distance at access points). This buffer shall have a minimum width of five feet, and shall consist of at least one tree for every 40' of boundary, plus clusters of shrubs at selected locations, with location and species subject to approval by the Division of Building Inspection. In those areas along that property boundary where there are no vehicular use areas, periodic groupings of shrubs, rather than a hedge or continuous plantings, is acceptable.
 9. An administrative action plat reflecting a reduction of the 125' building line, strictly for parking purposes, as well as a consolidation plat for the two lots, shall be filed with the Division of Planning and recorded prior to the issuance of any building permits. A note reflecting action of the Board shall be placed on the plat.

Representation – Ms. Rena Wiseman, attorney, was present to represent the appellant. Mr. Tony Barrett, Landscape Architect, was also present, and he distributed a packet of exhibits to the Board members.

Ms. Moore indicated that the Board had received one letter of support, and several letters in opposition to this appeal. Those letters were circulated to the Board by Mr. Marx.

Appellant's Presentation – Ms. Wiseman asked the supporters of the Greek Orthodox Church to stand, and about 25 persons did so. She said that the appellant did agree with the staff recommendation and the conditions recommended for approval, with two corrections. She said that the church's square footage on the site plan is different than that identified by the staff. The new site plan submitted also included floor area in a basement under the church, and a choir loft was also included, for a total of 19,450 square feet in the building. She said there were not any changes to the other aspects of the site plan. She asked that condition #1 be changed to reflect the "revised site plan" distributed at this meeting. The other condition that is needed is to request that the church be given two years, instead of the usual one year, to exercise the conditional use permit, as there is a capital campaign now underway to fund construction. With those two changes, she said that the church was in agreement with the staff recommendations.

Ms. Wiseman said they had distributed a number of exhibits to the Board members at the start of this hearing. She introduced Dr. Dennis Karounos, the Chairman of the church's Building Committee. Father George Wilson was also introduced, and she said their architect was in transit to the hearing.

Ms. Wiseman said this church had been before the Board several times, most recently in 2009, seeking permission to expand their existing facility to the north of this site. She displayed a photograph of the existing church at the corner of Melrose and Tates Creek Road. She said the church had been at this location since 1952, and that the membership of the church is stable. She said the existing church doesn't have modern amenities and doesn't meet the congregation's needs. She said it is not handicap accessible, and that the church hall, used for meeting space, is in the basement. The church's restrooms are in the basement as well, and elderly and handicapped church members can not participate in many functions and social activities. She said that there is also no on-site parking. The neighborhood had an agreement with Cassidy Elementary School to utilize their parking lot, as the Melrose neighborhood had complaints about their on-street parking. The church wasn't successful in having an upgrade to their existing sanctuary approved by the Board. She said the church was not expanded due to concerns about parking, handicap parking proposed on their site, accessibility, lack of a drop-off area, traffic, drainage, sewer capacity, and compatibility with the neighborhood.

Ms. Wiseman opined that those properties were too small for the scale of the expansion desired by the church. She said that it was hinted at the past BOA meetings that, perhaps, the church needed to find another location. She said the church's nearby neighborhood association president came to the last two Board meetings in which the church appeared to support their efforts, but he also said if obstacles remain before them, then "the church will just go away." She said this church had arrived at that point. They were unable to expand at that location, so they now have brought this application.

Ms. Wiseman said that, at Tab 5 of the Exhibits, the church looked at several properties in Lexington-Fayette County, including the former Julia R. Ewan School site (approved for another conditional use permit earlier at this meeting). She said this was a small church looking to improve their worship and their facilities—the minimal elements necessary for any modern church. She said this was not a "mega-church" and that they would not have an associated school or child care facility. The church had tried to find an appropriate location to practice their faith, and she said this property was appropriate for that

purpose.

Ms. Wiseman displayed an aerial photograph of the subject property on the overhead projector, which showed that this 1.3-acre site on the corner of Rebecca Drive and Bates Creek Road was directly across from the largest church in Lexington - Immanuel Baptist Church. The photo showed not only the Immanuel Baptist Church and its large parking lot, but also the Bates Creek Christian Church at the corner of Albany and Bates Creek Roads. She said that photo was taken before 2008, and she then displayed a more recent photo which indicated an expansion was underway for Bates Creek Presbyterian, which was approved by the Board in 2008. She also showed a photo of the Centenary United Methodist Church at the corner of Old Mt. Tabor Road and Bates Creek Road, in this vicinity.

Ms. Wiseman displayed the revised site plan for the church on the overhead projector. She said this site was three or four times larger than the Greek Orthodox Church site on Bates Creek Road at Melrose, and that this location was large enough for their sanctuary, a new fellowship hall, 54 off-street parking spaces, including handicapped parking spaces, as well. There was room for drop-off and pick-up areas, and there was room available for occasional delivery trucks. She said the problems the Board found with their expansion plans for the Melrose site were not present at this location, but that the same sort of concerns had been expressed by neighbors to this site. She warned that the church had not satisfied all of the neighbors' issues. However, Ms. Wiseman provided a letter of support from Ms. Jane Eaton, 2995 Bates Creek Road, who owned property directly across Rebecca Drive from this location.

Mr. Barrett described the revised site plan for the church, and displayed a rendering of it for review by the Board. He oriented both adjacent roadways, and said that the existing residential driveway entrance to Bates Creek Road would be utilized. Also, a new access point would be constructed onto Rebecca Drive for the church. He said simple circulation routes would be provided through the site, and two drop-offs would be provided - one for the church and one for the Social Hall. Drainage would flow toward the intersection, so a rain garden and storm water basin would be provided on that corner of the property. He said they were also exploring the possible use of pervious pavers in a portion of the front parking lot, to address the water quality treatment of storm water runoff. This site would have room for a dumpster, and the landscaping requirements of the Zoning Ordinance could also be met, including screening of the adjoining properties with trees and a hedge planting.

Mr. Barrett said that there was a 125' platted building line from Bates Creek Road, and a 15' setback platted from Rebecca Drive, although the Zoning Ordinance requires at least a 30' setback from both. He said a variance was also being requested to allow the parking to be closer to those roads than 30', while the church building will respect the existing 125' building line. Ms. Wiseman said the zoning setback was applicable to the building and the parking lot, and that all of the required parking (for 30 spaces) would be located well behind the required 30' setback. However, the 24 surplus parking spaces proposed were to be as close as 15' to both roads.

Ms. Moore asked about the vacant lot that was part of the application. Mr. Barrett replied that the existing house would be replaced by the church buildings, and in a similar location. Ms. Wiseman replied that the house was constructed on two lots, which were not consolidated in the 1950s when it was built. That was why their site plan depicted two lots for these 1.3 acres. She recognized they would need to record a consolidation plat before they would be permitted to construct this church.

Mr. Dennis Karounos, Building Committee Chair for the Greek Orthodox Church, presented a PowerPoint presentation to the Board. He said he had been a member of the church for more than 50 years, and that he had served as Parish Council President and Vice President. He said the current facility needs of the church were for an elevator, handicapped ramps, handicapped restrooms and on-site parking, as the existing church did not have these amenities. He said the official church membership had fluctuated from 64-82 families from 1990 to the present, and that their church serves all of Central and Eastern Kentucky.

Mr. Karounos said they had tried to contact the neighborhood association in the vicinity of this site, but learned that there was not one identified. Instead, they mailed postcards and had an Open House for the neighbors to this site. He said at that event, there had been concerns expressed about their proposed activities. He said the church averages five baptisms per year, two weddings, 2-3 confirmations per year, and three funerals annually. They did conduct Sunday school, but they do not operate a school for academic instruction, and they do not currently operate a day care facility. Their membership, as of last month, was listed as 104 adults and 39 children. He said they did have a philanthropic presence in the community, but they do not host such activities.

Mr. Karounos said that the church attempted an expansion in 2004, and again in 2006. He said that their

Parish Development Planning Study from that year led to a scaled back plan which the Board reviewed in 2008 & 2009, which was rejected. He said the church had looked for land in several areas, including in Woodford County, which prompted concerns from their current church membership. He said this site is only 1.4 miles south of their current location, and he displayed a rendering of the proposed church building on the overhead projector. He said this facility would be centrally located for their membership, but more importantly, would meet the church's immediate needs.

Mr. Karounos said another concern that had been expressed at their Open House was about the possibility that property values would decline near this site. In response to those concerns, the church had studied the home values near their church on Melrose, and said homes in that area had consistently increased in value, and not a single one had dropped in value. He said homes near their church had been selling for 96% of their asking price, and that he had that information for the Board to view on this subject, if they wished to do so.

Mr. Karounos said the Greek Orthodox Church did not have many cars, and they had conducted a census of the vehicles that came to their church services. He said that usually 30-40 cars come to the church on a typical Sunday morning service, with an average attendance of 77 persons. He said that during the week, there are services attended by 10-12 people with 4-8 cars. He said that choir practice was held weekly for their eight-member choir. He said during Easter week, the church conducted more services and there were usually a few more in attendance. Otherwise, he felt that they did not generate a lot of traffic impact, especially compared to many of the larger churches nearby.

Mr. Karounos said that an infirmed church member had asked for church services to be held up to a telephone, so that they could hear the services from their home. He said another family had a child in a wheelchair attend Faith Lutheran Church while his parents attended the Greek Orthodox Church. He felt that the family needed to have all their members attend their church, and that they would prove to be good neighbors to the residents along Rebecca Drive.

Ms. Moore asked if the Greek Festival would be held at this location. Mr. Karounos replied in the negative, and said that the Festival is held at the Olieka Shriners' Temple in Southland, as it was the largest dining hall in Lexington. He said they would continue to hold their bake sales and an occasional dinner at the church, but the Festival would continue to be held at the Shriners Temple.

Ms. Wiseman said that there was an intensity difference between the Greek Church and some of the mega churches, such as Christ the King Cathedral. She said that the traffic impact expected for their church, according to the 8th Edition of the ITE Manual, is 0.55 times the building size (per 1,000 square feet). She said the Manual indicated their estimated impact to equal 11 trips in the PM peak hour. Ms. Wiseman said this was a low-intensity church, compared to the ones already located in this vicinity.

Mr. Alexander Christoforidis, architect, said he had worked with this congregation previously, and that the sanctuary had to face east. The site design allowed the sanctuary to be set closer to the property corner, and allow improvements to scale back to the residential properties nearby. He said they were able to design a porch around the building, which would be at a height of about 11'. He said the Social Hall would be about 15' high, as they did not want it to be out of scale with the neighborhood. He displayed a rendering of the architectural design for the Greek Orthodox Church on the overhead projector.

Ms. Wiseman said they had reviewed past editions of the Board's minutes regarding church conditional use permits in residential zones. She said that 155 cases were approved by the Board, although some had neighborhood opposition. She said three cases were disapproved by the Board; two for the reason that they were served by substandard roadways and the third was denied in an industrial area where the main concern was that it was too far detached from any residential area.

Ms. Wiseman displayed several aerial photo exhibits of nearby churches, including Centenary Methodist, Immanuel Baptist Church, Bates Creek Christian Church, and the Church of Latter Day Saints located at the corner of Alumni Drive and Bates Creek Road. She said photos of other churches were also included in the packet of information submitted to the Board. She said that this was an equally appropriate location for a church. She said the church had made every attempt to expand at their existing location, without success, and repeated that, with the two changes, they would agree with the staff's recommendation for approval.

Staff Comment – Ms. Moore invited any staff comments at this time. Mr. Marx stated that several letters of objection had been received from area neighbors, including one from Ms. Susan Moore, 311 Patchen Drive, and owner of adjoining property on Bates Creek Road, who requested that her letter be read into

the record of this meeting. In response to her request, Ms. Meyer read the letter into the record (attached as an appendix to these minutes).

Objections – Mr. Ernest Cruse, 853 Rebecca Drive, spoke in opposition to this request. He said the entrance proposed to Rebecca Drive needed to be removed, and that “No Parking” signs also needed to be installed along that street, due to the amount of traffic using it. He said that there was quite a bit of speeding on that street, as well. He said members of four churches use that street now, as well as traffic headed to Central Baptist Hospital.

Mr. Cruse asked when these church buildings would be constructed, as he was concerned that the Social Hall would be built and occupied first. He said any dumpsters on the site to serve this church would need to be well screened in an attractive fashion.

Ms. Moore asked if Mr. Cruse did not want an access for the church from Rebecca Drive. Mr. Cruse replied that he did not want to see an entrance to the site from Rebecca, but that he would approve of an exit onto that street. He said that on-street parking on Rebecca Drive from Windermere to Tates Creek would be very problematic.

Mr. John Douglas, 783 Rebecca Drive, said his home was beyond the 400’ notice area, but thanked the Board for the opportunity to speak in opposition. He said the neighbors did not have an organized neighborhood association, but a number of neighbors were present to object to this request. While he admired the passion and the conviction of the members of the Greek Orthodox Church, he felt another location would be more suitable for their church.

Mr. Douglas said that the neighbors were not angry at the church, despite some local news reports, but they did have some concerns with their request. He said Hinda Heights residents disagreed with the staff recommendation for approval of this conditional use permit. He had concerns about the change proposed for this property from a residence with a lawn to a church with a parking lot, and thought this would change the character of the neighborhood. The neighborhoods along the west side of Tates Creek were vastly residential in character, with the exception of the Church for Latter Day Saints.

Mr. Douglas said he bought his home in 1992, and many of his neighbors and he believe they had purchased homes in an established neighborhood where risks of future development were minimal. This explained the lack of a need for a full neighborhood association to be formed. He said the churches in this area were all farms before they were constructed.

Mr. Douglas said no stoplight could be installed at Rebecca Drive at Tates Creek Road intersection, because that is a state highway. He said traffic was bad now at that intersection, but the prospect for a future signal there “was not strong.” He felt the site would be intense, and after construction began, there could be changes made to this site plan.

Mr. Douglas said at the recent Open House held at the Greek Orthodox Church, residents expressed concern about whether a survey had been conducted, or whether the Tates Creek sidewalk had been factored into the design of their site plan. He said there needs to be at least 50 parking spaces provided on this property, as area neighbors do not want the current parking problem for this church to migrate farther down Tates Creek Road to this location.

Mr. Douglas said he was concerned about traffic congestion at the intersection of Tates Creek and Rebecca Drive. He said Immanuel Baptist hires an off-duty police officer to direct traffic opposite of Rebecca Drive, but Centenary recently discontinued a similar practice. He said there is true concern about a shift in traffic patterns if this church locates here, and he worried that there would be growth at this church, as other property is currently for sale along Tates Creek Road. Had the church purchased this land as well; another existing curb cut could be utilized instead of Rebecca Drive for their second parking lot access. This would create a minimal impact to the neighbors, and more existing trees could also have been saved under such an approach.

Mr. Douglas said residents were also concerned about the phasing proposed for this church. Residents were told at the recent Open House that the Social Hall would be constructed in the first phase, and that additional pledges would be needed in order to complete the project. He noted their earlier request for additional time, and said the church should have worked with a developer to obtain a site at the start of a new residential neighborhood development – informing residents of its planned location in advance. He asked the Board to consider the neighborhood’s concerns today, and to consider what may occur in the future. He asked the Board to remember that churches were now business entities, as some even

contain restaurants.

Mr. Ted Walter, a 36-year resident of 775 Rebecca Drive, spoke in opposition to this request. He said he was concerned about the traffic impact of this proposed use. He said every time Central Baptist Hospital expanded, traffic had increased on this street. He noted that Commonwealth Stadium and the Arboretum had been built since he moved onto the street – both of which had similar results. He said he was not opposed to the church, but rather, to this proposed location for the church. He said that the traffic impacts had not been properly reviewed by the staff and that the Centenary United Methodist Church also had an impact to traffic in this area. He worried that employees for Central Baptist Hospital were using Rebecca Drive as a cut-through.

Mr. Walter said that ambulance runs occur daily, and citizens cut-through on this street to get from Old Mt. Tabor Road to Southland Drive. He said that Glendover School also had a significant traffic impact, as did the Crestwood Christian Church. All these uses combine to create a huge effect upon the neighborhood, and he agreed with Mr. Douglas that this was not the appropriate place to construct this church. He requested that the Board deny permission for the church to build on this corner lot, and he implored the Board to deny any entrance to Rebecca Drive.

Mr. Charles Moore, an owner of adjacent property on Tates Creek Road since 1960, spoke in opposition. He said when the churches across Tates Creek Road were built, they had the approval of the residents on the west side of the road, with the stipulation that the churches “would not come across the road.” He said he had seen fatalities at Rebecca Drive and Tates Creek Road, and had witnessed bad accidents at the Albany Road intersection as well. He objected to the church’s proposal to construct parking in front of the 125’ setback line, and said the neighbors had not seen any revised plat or site plan for the property.

Mr. Moore asked if they own the lots next door to the subject property, and if they objected to the church being at this location. He said he understood that the Johnson heirs wanted to sell their land, but still, he strongly objected to a new church locating here.

Mr. Julian Beard, resident of 809 Glendover Road and the 4th District Urban County Councilmember, spoke at this time. He said that traffic would travel west across Rebecca Drive to Windermere, so that folks can get to the traffic light at Albany & Tates Creek. He felt the residents on Windermere would be impacted from this new church. He said he was concerned about the loss of six mature trees along the frontage of Tates Creek Road, and said the landscape drawing depicted 1-2” caliper trees, not the mature ones on the property currently. He said that his major concern was with the site plan’s depiction of the curbing on Tates Creek. He felt that there would be a 6’ sidewalk setback only about 1’ from the existing curb. This would be worrisome because vehicles travel 45-50 miles per hour on Tates Creek Road. He said the church would likely be asked for a sidewalk easement, should this site plan be approved.

Mr. Beard said that the sale of the property at Tates Creek and Melrose looked to be the funding mechanism for this proposal, and he wondered, given the history of that location and the lack of parking, “who in the world is going to buy that property?” He also said that the 400’ notice requirement did not seem to be adequate in this instance, given the prevalence of 125’ wide residential lots in this area.

Mr. Neill Day, neighborhood resident right behind the Johnson’s house on Windermere Road, said he was a supporter of the Greek Orthodox Church. He asked if one of the prior photographs shown by Ms. Wiseman of the property and the Immanuel Baptist Church property could be shown again on the overhead projector. Mr. Day said that he had served on the Planning Commission for eight years, and that often, the Commission spoke of the need for Infill & Redevelopment. He said that everyone is for “infill and redevelopment “ until it reached their neighborhood.

Mr. Day said his main concern would be for the church to buy both of the lots available in this area in order to build their church. As a member of the Planning Commission used to tell him, ten pounds of flour won’t fit “into a five pound bag.” When he initially viewed the proposed site plan, he couldn’t imagine that the trees along Tates Creek Road would be removed. He felt that the proposed development, as proposed, would be too intense, and that the church needed another lot in order to spread out. He felt that the church needed to explore purchasing another lot along Tates Creek Road so that they wouldn’t have to build as close as 15’ to that road. He said this plan was simply too intense for this corner.

Appellant’s Rebuttal – Ms. Wiseman felt that the church was now hearing the same objections as had been voiced before at their existing site. She said all this church needed was 1.3 acres. This request was for a small church, and they didn’t need to purchase more land as the church is not attempting to construct more than the site can sustain. She said that the 24 surplus parking spaces are the subject of

the variance request, not the 30 required parking spaces—all of which can be constructed without the benefit of a variance. She said that they weren't all needed, but they also didn't want any complaints about parking spaces, or the lack thereof.

Ms. Wiseman said that many objections were about facets of the church's operation that were not, technically, before the Board. She said this church was not asking to build a church-operated school or a day care center. She said modest events were all that were planned, and should the church ever want a day care or a school, then they would have to return to the Board for approval. She said all they could ask is that the Board review their site plan, and consider what they actually had requested at this location.

Ms. Wiseman said the objectors reports about heavy traffic were during the weekday, when the nearby schools were open. The traffic coming to this site will be on Sundays, and only modest events, as had been described, would occur on weekday evenings. Regarding the Bates Creek Road access point proposed, she said that the church already had an Encroachment Permit for that access from the Transportation Cabinet. However, the church also needed the Rebecca Drive entrance, as it was important to permit the drop-off and pick-up flow through the site. Still, most of the activity of this sort will occur on Sunday mornings, not on the days when Glendover Elementary School is in session.

Ms. Wiseman said that the church had already received two inquiries about their property at 920 Bates Creek Road. She said that if they were successful, they would engage in conversations with those small churches about selling that property. Regarding the sidewalk on Bates Creek Road, Ms. Wiseman said that it would be constructed where it was planned, regardless of whether or not a church located on this property.

Ms. Wiseman said that the church believed their site plan was not too intense, especially given the churches located across the road from this site. This congregation was requesting approval of a much less intense development than exists on those sites. This was a church that was entitled to an appropriate place to worship, and they had made every effort to remain in Lexington, as the listing of locations they had reviewed previously indicated. The church was told they needed to locate somewhere else, and she did not believe that was a satisfactory answer. She asked the Board to approve their request.

Objectors' Rebuttal – Mr. Cruse said that he had lived on Rebecca Drive since 1975, and that a recommendation against a new access point on Rebecca Drive should not be interpreted as a rejection of this church. He said that Rebecca Drive is unlike other roads in the city. There was traffic on it on Sundays and on every other day of the week. He felt that the traffic travelling at 45-50 miles per hour on Rebecca Drive warranted a speed bump, or some other traffic calming device, and there should not be an access for a church located off that street.

Ms. Brenda Rue, 870 Rebecca Drive rose to address the Board.

Objection – Ms. Wiseman objected to Ms. Rue's ability to offer rebuttal, as she did not previously address the Board about this application.

Objectors' Rebuttal (cont.) – Mr. Douglas said that the church did obtain a permit for access to Bates Creek Road, but it was only for a right-in/right-out access. He said that no left turn into the site would be possible off Bates Creek. He said that at the Open House, he learned that a number of their members lived in Hartland, which meant either Windermere or Rebecca Drive would be utilized to enter the church property.

Staff Comments – Mr. Gallimore said that this was the smallest-scale church construction project he had ever seen. Given the previous experiences of this church on Melrose, he understood their desire for ample off-street parking at this location. He agreed with the objectors that Rebecca Drive was a crowded street during peak hours, and added that most other streets are as well. He said this project would not result in a huge traffic impact, as the church's prime times of activity would not be during peak hours of the main roadways. His concern was that the left turns on to Bates Creek Road would be difficult on Sundays, if this church "let out" at the same time as the others across the road. He suggested that the church consider staggered times for their services to avoid this potential problem. Mr. Gallimore said it might be easier for church members to turn right onto Bates Creek Road, and then turn left or make a U-turn further south on Bates Creek.

Mr. Gallimore said he would have been much more concerned about the traffic movements at this location if this church was requesting a school, a day care center, adult day-care, or other uses more likely to

operate during peak hours. He concluded that this construction was all this church intended.

Mr. Gallimore said he had recently viewed plans for the sidewalk project along Bates Creek Road, and that the sidewalk was to be 3-4' from the curb of the roadway, which is a standard separation in the urban area. He was pleased that it would not be like the sidewalk located along Versailles Road, for instance. He did not view the new sidewalk as germane to the church's plans.

Questions – Ms. Moore asked if the sidewalk was at all related to the variance request regarding the surplus parking. Mr. Gallimore replied that he did not believe they were intertwined at all.

Ms. Meyer asked the staff about the zoning of the property. She asked how the Zoning Ordinance would be interpreted to require the church to come back before the Board if they wished to expand their facilities or uses in the future. Mr. Sallee replied that all of the uses described today were listed as Conditional Uses in the Zoning Ordinance, for the R-1C zone, and that the church had not asked for day care or for a church-related school as part of this current application. A future application for those uses would require mailed notifications to area property owners, and another public hearing before the Board, as had occurred with this application.

Rebuttal (cont.) – Mr. Beard commented that the requested building line variance warranted an easement for the new sidewalk along Bates Creek Road in front of this property. He said that right-of-way constraints on other portions of Bates Creek Road would require the sidewalk to be placed adjacent to the curb line, as the western edge of the road was not surveyed years ago with great precision.

Discussion – Mr. Stumbo agreed that Rebecca Drive was one of the busiest streets around, but he also agreed with Mr. Gallimore that this church would be a low impact traffic generator. He said that the Board had worked with this church over the past three years, and that they had done their due diligence. He said he agreed with Ms. Wiseman that they needed a modern place to worship, and that this was an appropriate place to do so.

Action – A motion was made by Mr. Stumbo, and seconded by Mr. Glover to approve **CV-2010-95: GREEK ORTHODOX CHURCH** – an appeal for a conditional use permit to construct and occupy a church with accessory parking; and a variance to allow parking within the required front and side street side yards in a Single Family Residential (R-1C) zone, on properties located at 3001 & 3005 Bates Creek Road for the reasons provided by the staff, and subject to the conditions recommended by the staff, except as requested for amendment by Ms. Wiseman earlier in the hearing, and adding a 10th condition as follows:

10. The applicant shall have 24 months to exercise this conditional use permit.

The votes on the motion were as follows:

Ayes: Griggs, Glover, Moore, Stumbo

Abstained: Meyer

Absent: Stout, White

The motion for approval carried.

Ms. Moore wished the church good luck.

Note: The Vice-Chair declared a recess at 4:06 PM. She resumed the meeting at 4:21 PM with five members in attendance.

2. **CV-2010-98: B & S RESTAURANT MANAGEMENT** - appeals for a conditional use permit to provide live entertainment (DJ & bands) and dancing at a restaurant/bar; and a variance to reduce the required 100' setback from a residential zone to 0 feet in a Neighborhood Business (B-1) zone, on property located at 120 (aka 122) W. Maxwell Street (Council District 3).

The Staff Recommended: Postponement, for the following reasons:

- a. Written assurance has not yet been provided by the owner of the subject property indicating that the appellant is authorized to pursue a conditional use and variance for a bar & grill with live entertainment.
- b. Additional details are needed regarding: (1) the intended use of the outdoor deck/patio and courtyard

- adjacent to the building; (2) required off-street parking for the proposed use, which will require submittal of an indoor and outdoor seating arrangement, along with a calculation of the square footage of the building that will be used for the proposed activities; and (3) an assessment of required parking for other occupants of the building, and a description of how the available parking behind the building will be shared with those occupants and any other users in the area (e.g., Two Keys Tavern) that may have at some point been authorized to use that accessory parking lot.
- c. There are a number of residential properties in close proximity to the subject property. Alternative music venues and operational considerations should be explored by the appellant that might serve to reduce the potential for a bar/grill with live entertainment to adversely affect those properties.

Representation – There was no representative present for this appeal.

Discussion – Ms. Moore stated that the staff had recommended a postponement of this request. Mr. Marx said that, if postponed, the Board's next meeting date was November 19th.

Ms. Moore asked if there were any objections to a postponement of this request. None were voiced.

Action – A motion was made by Ms. Meyer, seconded by Mr. Stumbo and carried unanimously (Stout and White absent) to postpone until November 19th **CV-2010-98: B & S RESTAURANT MANAGEMENT** – an appeal for a conditional use permit to provide live entertainment (DJ & bands) and dancing at a restaurant/bar; and a variance to reduce the required 100' setback from a residential zone to 0 feet in a Neighborhood Business (B-1) zone, on property located at 120 (aka 122) W. Maxwell Street.

3. **CV-2010-100: TOTAL GRACE BAPTIST CHURCH** - appeals for a conditional use permit to expand the parking area; and variances to reduce the required front yard from 30 feet to 0 feet in a Single Family Residential (R-1C) zone and 20 feet to 0 feet in a Planned Neighborhood Residential (R-3) zone, on properties located at 1313 & 1317 N. Limestone Street (Council District 1).

The Staff Recommended: Postponement, for the following reasons:

- a. Additional time is needed for the appellant to consider a modified proposal that reduces the extent of paving proposed in the front yards of each lot, with the goal of maintaining a comparable amount of open space as that provided on the adjoining residential properties.
- b. There are significant questions related to the overall design of the parking areas that are proposed, which should be discussed with the Division of Traffic Engineering prior to the Board's consideration of the conditional use request.
- c. The provision of landscape buffers for the proposed parking lot, whether required by the Zoning Ordinance or otherwise deemed desirable, should be addressed by the appellant. Given the narrow width of the northerly lot, and the limited space between the church building and North Limestone, such buffers may ultimately determine the feasibility and design options for expanding the off-street parking areas for this church facility.

Representation – There was no representative present for this appeal.

Discussion – Mr. Sallee stated that he had called Pastor Robinson, the listed contact for the appellant, earlier in the afternoon, and that he did return the call to the Division of Planning office. Pastor Robinson spoke with Ms. Rackers, who said that he would be amenable to a postponement of their request.

Ms. Moore asked if there were any objections to a postponement of this request. None were voiced.

Action – A motion was made by Mr. Glover, seconded by Ms. Meyer and carried unanimously (Stout and White absent) to postpone until November 19th **CV-2010-100: TOTAL GRACE BAPTIST CHURCH** – an appeal for a conditional use permit to expand the parking area; and variances to reduce the required front yard from 30 feet to 0 feet in a Single Family Residential (R-1C) zone and 20 feet to 0 feet in a Planned Neighborhood Residential (R-3) zone, on properties located at 1313 & 1317 North Limestone Street.

4. **C-2010-88: TRILOGY HEALTH SERVICES, LLC** - appeals for a conditional use permit to construct and occupy an assisted living facility in a Planned Neighborhood Residential (R-3) zone, on property located on a portion of 2599 Old Rosebud Road (Council District 6).

The Staff Recommended: Approval, for the following reasons:

- a. Granting the requested conditional use permit should not adversely affect the subject or surrounding properties. Immediately bordering property is currently vacant, with some type of residential use anticipated at some time in the future. With the recommended 15' wide landscape buffer along the property perimeter, the specialized residential facilities that are proposed should be compatible with whatever type of residential use is developed on the immediately adjoining property. Assisted living facilities do not generate high levels of traffic, and the activities at such a facility are not inherently noisy or otherwise disturbing, an important consideration given the location of the existing West Wynd subdivision.
- b. All necessary public facilities and services are or will be available and adequate for the proposed use.

This recommendation of approval is made subject to the following conditions:

1. The assisted living and Alzheimer care facilities shall be constructed in accordance with the submitted application, and a revised site plan as amended to be consistent with a Final Development Plan approved by the Planning Commission.
2. All necessary permits shall be obtained from the Division of Building Inspection prior to construction and prior to occupying the facilities.
3. The parking lots shall be paved, with spaces delineated, and landscaped in accordance with the requirements of Articles 16 and 18 of the Zoning Ordinance.
4. The final design of the access point, traffic aisles and layout of the parking spaces shall be subject to review and approval by the Division of Traffic Engineering.
5. Any outdoor pole lighting for the parking areas shall be of a shoebox (or similar) design, with light shielded and directed downward to avoid disturbing adjoining or nearby properties.
6. A storm water management plan shall be implemented in accordance with the requirements of the adopted Engineering Manuals, subject to acceptance by the Division of Engineering.
7. Old Rosebud Road shall be extended to the west end of the subject property, in accordance with the design and other requirements reflected on a Final Development Plan for the subject property approved by the Planning Commission. This extension shall be completed prior to the issuance of an occupancy permit from the Division of Building Inspection.
8. A 15' wide landscape buffer shall be provided around the full perimeter of the subject property (excepting the street frontage), to include (on the average) one tree for every 40' of linear boundary, recognizing that trees may be staggered rather than formally aligned. The buffer shall also include a minimum of fourteen perimeter landscaping areas, each with a minimum size of 120 square feet and planted with a mixture of shrubs and small species trees. These islands shall be located and otherwise designed to complement or be coincident with any screening required for the vehicular use areas, and shall be generally distributed as follows: five along the west side of the property; five along the rear property line; and four along the east side of the property. The overall design of the landscaping plan for this 15' wide perimeter buffer, including a description of species of plants to be used, shall be subject to review and approval by the Landscape Examiner with the Division of Building Inspection.
9. Action of the Board shall be noted on the Final Development Plan for the subject property.

Representation – Mr. Glen Hoskins, attorney, was present for the appellant. Also present were Mr. Ross Oberhausen of Trilogy Health Services, and Mr. Tim Haymaker who is the owner and developer of the property.

Note: Mr. Glover recused himself from the meeting, since Mr. Hoskins was his law partner, and left the Council Chambers at this time.

Appellant's Presentation – Mr. Hoskins stated that the appellant was in total agreement with the conditions for this use recommended by the staff. Mr. Hoskins said that the real issue with this application was whether or not this particular piece of property was appropriate to be used for their particular project—which was an assisted living facility. He anticipated that the objectors would be speaking about the landscaping and the buildings' architecture, but he did not believe those to be the major issues with this application.

Mr. Hoskins distributed a packet of exhibits to the Board members and to the staff. He said that he would like the Board to understand the plans and designs for this property. He introduced Mr. Oberhausen to present that information.

Mr. Oberhausen gave his address as 1650 Linden Farm Court. He said that Trilogy Health Services was founded in 1997, and that they opened their first facility in 1999. He said that they currently operate 63 facilities in Indiana, Ohio, Kentucky, Michigan and Illinois, and that they provide three types of care: skilled

elder care, adult day care and assisted living. They have recently expanded their facilities to include memory care, independent living, transitional care and home health care.

Mr. Oberhausen said that, locally, they had acquired 162 beds from the Northpoint-Lexington Health Care Center, and they now hoped to construct and/or operate three facilities in Lexington-Fayette County. They were convinced that they could provide better service with a smaller number of beds in each facility. He said that they had recently been voted the #1 place to work in health care in the state of Kentucky two years in a row; and, in 2010, were voted the second best.

Mr. Oberhausen provided a video presentation of the proposed facility, saying that the one shown on the overhead projector was a new facility in Commerce, Michigan. It was very similar to the one now proposed for the subject property. He said that the video was a "fly-over" of the site, and that the assisted-living facility would have its own, separate entrance. He said the proposed building would have skilled care and assisted-living components. There would also be memory care patients in this facility.

Mr. Oberhausen said that Trilogy often looks to locate their facilities in neighborhoods. They want their residents to feel as if they are "home" so they do not wish to locate in commercial areas. They anticipate 50-60 skilled care beds at this location, 37 of which will be in private rooms. The building was to be 58,000 square feet in size, and the tallest portion of the building was to be 18' high. They anticipate 40 assisted living units, which will each contain kitchen facilities and full-sized bathrooms. The construction cost was projected to be \$6M-\$7M, and the construction was anticipated to take ten months.

Mr. Oberhausen said that the second building proposed for the site is known as "the Legacy." It is to be a self-sufficient, secure building for residents suffering from Alzheimer's disease or dementia. It is to contain 22,000 square feet and have 22 private rooms and one semi-private room. There are also common spaces proposed in this building for their residents, and residents can help prepare their evening meals in the building's kitchen, if they wish. This building was proposed to cost \$2.2M.

Mr. Oberhausen said, in anticipation of discussions about traffic impacts that their staffing shift changes are at 7:00, 3:00 and 11:00 each day, which will not impact any typical day's "rush hour." Their facilities average about 25 visitors each day. In terms of ambulances, they would expect about three such visits in a "busy" week, based upon their company-wide averages, but they do have medical staff available for typical care needs for their residents.

Mr. Griggs asked if the project was proposed in stages. Mr. Oberhausen replied that the construction was proposed to take place all at one time. He presented a photometric display of the site lighting that was proposed, and said that the site lighting should not interfere with any of the nearby residences.

Mr. Rory Kahly, landscape architect with EA Partners, displayed a preliminary landscape plan for the site. Mr. Oberhausen, in referring to the graphic on display, said that there will be planting areas provided around all of the buildings, all of which will be irrigated. The stone and mulched areas will also be provided in the site landscaping. He said that about 48 trees were to be planted on site, each having a 2-2½" diameter at planting.

Ms. Moore asked whether the appellant intended to take their project before the Planning Commission for their approval. Mr. Oberhausen replied affirmatively.

Cross Examination – Mr. Bruce Simpson, attorney, had several questions for Mr. Oberhausen, although he acknowledged that he had attended the meeting Trilogy held a few weeks prior with the nearby neighborhood association. Mr. Simpson asked if Trilogy began in 1997, and today had 63 facilities. Mr. Oberhausen replied affirmatively. Mr. Simpson asked if they offered three levels of care—memory care, assisted living and skilled nursing. Mr. Oberhausen replied affirmatively, but added that they have also added "transitional care" which focuses on more intense therapy, such as after hip or knee replacement surgery. He replied that they also now provide home health services and adult day care.

Mr. Simpson asked if those services would be provided at this location. Mr. Oberhausen replied in the affirmative, but he added that they do not have a home health provider here locally. He said that they currently only provide home health care in Evansville and Muncie, Indiana. Mr. Simpson asked if the adult day-care would be part of the operation here in Lexington. Mr. Oberhausen replied in the affirmative. Mr. Simpson asked if the transitional care was intended to provide services to folks for about a week after their surgeries, before they go home. Mr. Oberhausen replied that most transitional care lasts only 4-5 days.

Petitioner's Remarks (cont.) – Mr. Hoskins asked Mr. Haymaker to address the Board about the development standards that will be placed upon the Trilogy facility.

Mr. Tim Haymaker, 3120 Wall Street, said that he appeared at the Board's meeting one year ago, prior to constructing the Moondance Pavilion in Beaumont. He said it had just been named one of the top attractions in Lexington by *Ace Magazine* and he thanked the Board for allowing him to construct that facility.

Mr. Haymaker said that, as a real estate developer, he felt it important to establish his credibility with the Board, and with any objectors that were present at this hearing. He said that they had received nine objections to this proposed use, and he hoped to dispel those concerns. He said that his company is community-minded, and that they had donated many acres for schools in the Beaumont area, along with park land, a YMCA facility, the amphitheatre, and 2½ miles of walking trails. He said that in the Coventry subdivision, which was an "affordable housing" development, they had spent \$250K on landscaping and entrance walls. He said that in Tuscany there are already three major entrances constructed for the development, with eight arbors and four trellises, and they had donated ten acres for another YMCA. They did this because his company wanted their communities to have high standards.

Mr. Haymaker said that, while on the Facilities Committee for the Fayette County Public Schools, he intervened to ensure that Bryan Station High School would have new facilities, instead of just a refurbishment.

Mr. Haymaker said that times are tough, and that although the Moondance Pavilion in Beaumont cost \$2M, it was the fulfillment of a commitment. He said that his company always fulfilled its commitments, and they give more than they are asked to give. He said that in all of his communities, they set homeowners' fees, but sometimes "eat" these fees, when it was not appropriate to impose them on the residents. They also choose to mow the bank-owned lots in their subdivisions, despite repeated phone calls to the banks for them to do so. They also chose not to sell lots in their developments at the same price that the banks were unloading them. He said that they were not going "to give this product away."

Mr. Haymaker said that he had at least five entities that wanted to construct assisted living and nursing home facilities on this site in Tuscany. He researched them, and Trilogy was the first one he "could live with." He said that Trilogy put thought and care into their grounds and into their services. In addition, he had five or six requests to construct apartments on this property. He said that this hearing would not be held if he had agreed to sell the property for 200 "vinyl-sided" apartments. He said that his company did not want that, but instead wanted a land use buffer between the 450-460 undeveloped acres in Tuscany and the neighborhood beside them. He thought that this would be an ideal and benign development.

Mr. Haymaker said that he couldn't understand why some in the existing subdivision might think that this facility would not be a high-quality development. He said that whether \$1M or \$160K homes, his company would insist upon high-quality development in Tuscany. He said that the neighbors wanted rain gardens in this development, noting that his son had just won an award from the Environmental Commission and had been asked to serve on the Stormwater Master Plan Workgroup. He said that his company worried about the environment and about silt and drainage. He said that they had never been cited for silt fences being down, or for not following the manuals.

Mr. Haymaker said that Trilogy provides as good a product "as is out there." However, he said that Mr. Simpson had sent an e-mail citing poor capital expenditures at many nursing homes. Mr. Haymaker said that, while the industry standard was \$100 per bed per year for capital expenditures, Trilogy spent \$300 per bed per year.

Mr. Haymaker stated that he also looked at six facilities that were located in Lexington on the Internet, all of which Mr. Simpson's wife was familiar with. He said he understood Mr. Simpson's concerns, if that was his perception of this proposed facility. Mr. Haymaker said that his parents were in nursing homes for eight years, and his older sister needed care for 13 years, as well. He said that his company knew what they like and what they don't like about nursing homes. He said that if a group doesn't have the right "corporate commitment" then "the wrong things" will happen.

Mr. Haymaker said his company was still making things happen in tough times. He said that they appreciated everything that the Board had allowed them to do in the past, and hoped to be allowed to move forward on this project.

Mr. Hoskins said, in summary, that they had several photos and background information of Trilogy

projects in other locations to submit into the record for review by the Board. He said that they may have provided more information than the Board may care to know about the appellant, and said that they are a quality operation. Mr. Hoskins submitted proposed "Findings of Fact" for consideration by the Board, and said that those offered by the staff were also acceptable to the appellant.

Mr. Hoskins said that society is aging, and that seniors need a place to live. He said that this application was for a residential project for elderly people that need a place like this to finish out their golden years. He asked what better place there was than Hamburg, with hospitals, restaurants, and health care providers located in close proximity. He said that there will be no traffic impacts, as only about 20 family visitors come to Trilogy facilities on the average day. He said that an apartment project would generate much more traffic than that.

Ms. Moore asked Mr. Hoskins if the appellant agreed with the recommendation of the staff, and with the conditions recommended by the staff. Mr. Hoskins replied in the affirmative.

Objectors – Mr. Bruce Simpson, attorney for the Hamburg Neighborhood Association, and said that he was mindful of the late hour, and that much of the expected testimony mentioned by the appellants would not be presented today. He said that he wasn't sure if the Pavilion or the economic factors mentioned by Mr. Haymaker were relevant to these proceedings. He also said that his wife had been committed to high quality health care for the 15 years that he had known her. He reminded the Board that this was a land use case, and that the objectors did have important questions for Trilogy about the type of application that Trilogy had filed.

Mr. Simpson said that the neighborhood did have a meeting where the appellant attended and provided important information. Mr. Simpson said that challenges to land use matters are expensive and that the neighborhood did have a settlement offer presented to Mr. Hoskins, but that they couldn't come to an agreement. He said that he felt this was an important consideration in each case in which he was involved.

Mr. Simpson displayed a photograph of the subject property on the overhead projector, and highlighted its proximity to the Hamburg Neighborhood Association, which was comprised of The Shetlands and West Wynd. He also identified the proposed "medical facility" site and the 450 acres to the north of it which Mr. Haymaker intends to develop. Mr. Simpson informed the Board that the Planning Commission had recently approved a 62-unit senior living apartment project on land adjacent to this location. He said that there was a lot of vacant land in this area, and that an appellant should be mindful of nearby residences.

Mr. Simpson said that the basic opposition to this appeal by the neighborhood was that the Board was precluded from approving this application. He said that Mr. Oberhausen testified that the uses in connection with this facility are not consistent with the definition of an "Assisted Living Facility" contained in the Zoning Ordinance. He provided a booklet of exhibits to the Board, with the displayed photo being the first exhibit.

Mr. Simpson said that the application filed for this property was for an "assisted living facility" and that matches the Refusal issued by the Division of Building Inspection (under Tab 2 of the Exhibits). The actual application for this use (under Tab 3) requests an assisted living facility. He said that Mr. Gatton, the current property owner, gave permission for the operation of an "assisted living facility" in a letter (under Tab 4 of the Exhibits) as required under law.

Mr. Simpson said that the notification letters mailed in connection with this application (Tab 5), and in a letter from the staff to the neighborhood association dated September 28, identified this request as being for "a conditional use permit for an assisted living facility on a 10-acre parcel." Mr. Simpson said that the legal advertisement in the local newspaper contained this same language, "nothing more-nothing less."

Referring to the planning Staff Report (Tab 6), Mr. Simpson said that it states that the appellant wishes "to construct and occupy an assisted living facility." He said that this was important in this case because (under Tab 7) the property was zoned R-3, and that subsection 2 under the allowable conditional uses lists "hospitals, nursing homes, orphanages" and the like, but under subsection 9 for the conditional uses, "assisted living facilities" are referenced. He said that this requested use (#9) was separate and distinct from that of a nursing home conditional use (#2).

Mr. Simpson said that the definition in Article 1-11 (Tab 8) for an assisted living facility states that it was "a residential facility *other than a nursing home* or elderly housing for persons who are 55 years of age, or older." He said that the definition for this use expressly excludes a nursing home, and that this pending

application was for an assisted living facility *only*. Mr. Simpson also provided the separate definition of a nursing home (Tab 9) contained in Article 1-11.

Speaking to the item in Tab 10, Mr. Simpson said that Mr. Hoskins provided an overview of the company at the Board's September 24th meeting, when a continuance was granted for this appeal. He said that he specifically asked Mr. Oberhausen today about the services that were to be provided. There was to be a skilled nursing facility, memory care beds, an adult day care, and transitional care at this location.

Mr. Simpson said that there was to be a continuum of care at this location-not just an assisted living facility. He said that of the 130 beds proposed at this location, only 31% of them are intended for an assisted living facility. He said that it was far beyond the ability of the Board to approve all of these uses at this site, and would, in fact, be arbitrary. It would also be contrary to the definition of an assisted living facility, which expressly excludes a nursing home. There was nothing in the application that requests a memory care unit, a transitional care facility, an adult day care facility, or the like. The application was only for an assisted living facility. He concluded that, as a matter of law, the Board must deny this application.

Ms. Moore asked if it was Mr. Simpson's position that the appellant should amend their application to also request a nursing home and perhaps a community center for the adult day care. Mr. Simpson responded that the only means by which the appellant could provide all of these services was to file a request for a Professional Office (P-1) zone at this location. He provided (Tab 17 & 18) definitions for medical clinics and (Tab 19) the uses permitted in the P-1 zone. The continuum of care must be done in compliance with the Zoning Ordinance, and those uses are only permitted in the P-1 zone.

Legal Comment – Ms. Boland said that she understood the argument that some of the proposed services did fall under the definition of a nursing home, as contained in the Ordinance. She had more concern with describing some of the proposed uses as a medical clinic, as those contemplated walk-in services. In looking at the definitions provided, she said that she was concerned that the notice given was only for an assisted living facility and that there may be some legal deficiencies. She said that an amendment to this application may be in order to request both an assisted living facility and a nursing home; but at a minimum, new notice should be given, especially if such an amendment to this application was filed.

Appellant's Rebuttal – Mr. Hoskins said that when all were at the Board's September meeting, Mr. Simpson requested a postponement at that time to try to "work things out." Trilogy was willing to answer all the questions of the neighborhood residents during the intervening five-week time period, and they did so. A meeting with the neighborhood was held on a Tuesday evening, October 5th. He said that 100 people attended the meeting, which lasted from 6:30 until 9:00 PM. He said that they answered every question posed to them about their facility, and offered to provide supplemental information. Mr. Hoskins stated that the appellant received no contact from the neighbors for more than three weeks thereafter, adding that only a few days ago, they received the nine concerns from the neighbors which Mr. Haymaker mentioned earlier, and that they agreed to most of the items in that recent communication. Some items, like a landscaping plan with a berm, are not finalized. They learned only 24 hours prior to this hearing that no agreement could be reached with the neighborhood's 400 residents. He felt that they had tried to accommodate the neighbors "above and beyond the call."

Mr. Hoskins said that today was the first time they had heard of this technical concern with the application. He said that nursing homes and assisted living facilities have evolved over time, and that elder care issues are more important now due to the aging of the general population. These modern facilities are now described as "assisted living facilities." He did not feel that the nursing home definition, which he read to the Board, accurately described the services the appellant wanted to provide at this location. He said that this will be a residential facility, as described in the zoning definition. He reviewed this definition and the "or" provision which describes the assisted living facility definition as elderly housing for those 55 or older which are provided a number of services.

Discussion – Ms. Moore said that it was clear to her that the Zoning Ordinance does differentiate between these two uses, and that she agreed with Ms. Boland's comments about needing additional notice. She asked if there are any services to be provided to people not admitted for a time period longer than 24 hours. Mr. Oberhausen replied that there was only one such service, and that was for the adult day care.

Ms. Moore asked if the adult day care was more like a community center. Mr. Oberhausen replied that one room was usually made available for drop-in visitors so that another family member can go shopping, or run errands, or the like. The guests can watch television, or nap, but there was also a "call button" if they need any type of assistance, including using the rest room.

Ms. Boland opined that the adult day care seemed to be clearly incidental to the requested assisted living facility. Mr. Oberhausen replied that it was usually only provided to individuals one or two days per week, and was a bit of a "feeder service." The assisted living residents usually require more care than the adult day-care visitors.

Ms. Boland said that the Board was charged with interpreting the text of the Zoning Ordinance. She said that the Board can make their own interpretation in this case. Ms. Moore said that the neighbors have "practical notice" in that they have held a dialogue, but the legal notice may be such that the neighbors need to be notified of the nursing home uses. Ms. Boland replied that the courts often look closely at the form of notice required under the statute. She said that the Staff Report mentioned the requested uses in this case, but that report does not satisfy the statutory notice requirements.

Mr. Marx stated that the site plan mailed to the neighbors identified the skilled nursing component for this use, and the Alzheimer's (memory care) wing of this proposed facility. Mr. Hoskins said that during all of their time spent on this application, there had been no confusion about the care that was proposed to be provided at this location. He did not feel that a recipient of the mailed notification letter could have somehow been confused by *not* having a long paragraph describing all of the detail of their proposal.

Mr. Griggs suggested to Mr. Hoskins that, if the Board proceeded to act on their request, the courts might be a more difficult venue to carry on this discussion. However, if the application were postponed to allow the re-notification, it might prove to be cheaper to the appellant in the long run. Ms. Moore thought that a court could rule either way. She felt that, besides the notification issue that the real issue was whether or not this use was only for an assisted living facility.

Objectors' Rebuttal – Mr. Simpson opined that this issue involves more than just a notification problem. He said that the Trilogy services were distinguished differently by Mr. Oberhausen. He said that the appellant had applied for one use, but wanted to do much more. The appellants admitted that different types of care are proposed for this facility.

Ms. Moore asked if the memory care services could be provided in a nursing home. Mr. Simpson replied that he wasn't sure that it could, as there was no definition for a memory care use. Mr. Griggs responded that the Board was charged with making these types of interpretations. Mr. Simpson replied that the Board does make the final decision, but that the neighbors do have opinions about this use. He told the Board that they were close to an agreement, but that they were unable to reach one. Given that, Mr. Simpson said that he was not apologetic for "blindsiding" the appellant, as he had advised his clients of the benefits of trying to reach an agreement on this land use. He said that he had made good faith arguments at this hearing on behalf of his clients.

Discussion – Mr. Griggs asked Mr. Simpson if he had fully disclosed what problems they had with this proposed use. Mr. Simpson replied that he had, and that they had offered a settlement agreement to the appellant. Mr. Griggs said that Mr. Simpson had to know of these legal concerns when they were negotiating a possible settlement. Mr. Simpson said that he had advised his clients to reach an agreement with the appellant.

Ms. Meyer asked what were the neighborhood's actual objections to this proposed use. Mr. Simpson replied that they wanted an enforceable, written agreement that covered maintenance of the buildings and grounds, lighting and other measures. He said that, although they did not have a written agreement, the parties were "pretty close" to an agreement. He said that there was a true, logistical problem in representing 400 people. The Board of the neighborhood association had to meet less than 48 hours prior to this hearing, review the proposal, develop an agreement or a counter response, share it with their membership, and then "wordsmith" the document. He said that he had experience in about 200 cases, locally, and was able to reach this type of agreement about 90% of the time, but often it takes time to do so. Mr. Simpson said that he would have proposed a meeting with the neighborhood about two months before filing the application, if such an agreement were desired. He said that it was often cheaper to reach an agreement ahead of time than to fight a land use decision in court. He said that they had tried to be reasonable in this case, but also had to protect the record on behalf of his clients.

Ms. Meyer said that it appeared that they will now have additional time to work out an agreement. She asked if the objections were to the proposed land uses, or to the fact that they do not have a final plan for the property that all could agree upon. Mr. Simpson replied that their objection was that, as a matter of law, the Board does not have the authority to approve this application, as it was inconsistent with terms of their application. He said that while their application was for an assisted living facility, they had admitted that they intend to provide many more services than those defined in the Zoning Ordinance for that use.

Mr. Stumbo asked if the neighborhood would be amenable to a 30-day continuance of this hearing, or were these legal objections and interpretations ones the Board would need to decide at this hearing. Ms. Moore said that the Board could choose to continue this hearing. Ms. Boland responded that the Board could provide the appellant with the right to amend their application. She said that the site plan that was mailed, as mentioned earlier by Mr. Marx, could have provided proper legal notice, but she was still concerned about the published newspaper advertisement. In the public perception, there could be a discernable difference between a nursing home and an assisted living facility. She suggested that the Board err on the side of caution.

Mr. Hoskins asked if the letters mailed by the staff had been more descriptive of the type of services to be provided, if this discussion would not be taking place. Mr. Simpson disagreed, noting that he objected to the Board making a decision regarding this application, as the appellants have, in their application, "requested the minimum" but really "wanting the maximum" in terms of the medical services they intend to provide. He said that they had described one thing to the Board but were intending to do something much beyond what was contained in their actual application. It was Mr. Simpson's opinion that to do everything that they desired at this location, the appellant needed to request a zone change.

Mr. Hoskins said that if they revised their application and re-notified the area property owners, and sought approval of the other conditional uses, then there should not be any neighborhood objection. Mr. Simpson said that if the appellant were to file a revised application, then the neighborhood would certainly take a look at the new information. If they also want to proceed in good faith on the settlement offer made by the neighborhood, then they could do that as well.

Ms. Moore said that it appeared to her that the Board was ready to make a decision on this matter.

Mr. Griggs asked the appellant if they wanted to re-notify neighbors, revise their application, and continue this hearing. Mr. Hoskins said that he was unsure, as the next BOA meeting was only three weeks away, so a continuance would mean this would case be heard again in December.

Ms. Moore said that it appeared to her that the appellant really wanted to conduct a nursing home and an assisted living facility at this location. She also felt that the legal notice may have been insufficient for both of these uses to be considered. For this reason, she felt that it would be appropriate for the Board to continue this hearing and that proper notice be given, for both a nursing home and an assisted living facility. She was not sure whether or not the neighbors would still object to the request.

Mr. Griggs agreed, as long as the staff provided a revised recommendation on the request. Mr. Sallee responded that, if there was a new application submitted, then there would also be a new staff report for the Board to review. He said that the staff did not address the nursing home use, given the definition of an assisted living facility provided in the Zoning Ordinance, referencing that "medical services may be provided" as part of that use.

Mr. Hoskins said that his client would be amenable to continuing this hearing to the December 10 meeting of the Board, with the caveat that they be permitted to mail out a corrected notice, and that a revised legal notice also be published.

Action – A motion was made by Mr. Griggs, seconded by Mr. Stumbo and carried unanimously (Glover recused, Stout and White absent) to continue this hearing for **C-2010-88: TRILOGY HEALTH SERVICES, LLC** – an appeal for a conditional use permit to construct and occupy an assisted living facility in a Planned Neighborhood Residential (R-3) zone, on property located on a portion of 2599 Old Rosebud Road, to the Board's December meeting.

Note: The Chair declared a recess at 5:45 PM. She resumed the meeting at 5:51 PM with five members in attendance, including Mr. Glover.

5. **C-2010-99: CON ROBINSON** - appeals for a conditional use permit to conduct a temporary mining and quarrying operation to improve an existing composting site in the Agricultural Rural (A-R) zone, on property located at 4247 Georgetown Road (Council District 12).

The Staff Recommended: Approval, for the following reasons:

- a. Granting the requested conditional use permit should not adversely affect the subject or surrounding properties. The quarrying activity will be temporary in nature and confined to the 22-acre composting

site that was previously approved by the Board. All excavation has been specifically designed to provide a relatively flat and hard surface to facilitate year-round composting operations.

- b. All necessary public facilities and services are available and adequate for the proposed use.

This recommendation of approval is made subject to the following conditions:

1. Excavation activity shall be done in accordance with the submitted application and site plan, as detailed in the grading permit issued by the Division of Engineering.
2. Operational aspects of the quarrying activity, and other related activities that are not addressed by the grading permit, shall take place as detailed in a mining and quarrying permit, evaluated pursuant to Ordinance #252-91 of the Code of Ordinances, which shall be obtained from the Division of Building Inspection prior to resuming quarrying activity at the site.
3. The activity shall at all times comply with the conditions and requirements of the Mining & Quarrying Ordinance #252-91, as well as applicable regulations administered by the Kentucky Energy and Environment Cabinet's Division of Mine Reclamation and Enforcement.
4. All quarrying activity shall be completed on the site by December 31, 2012.
5. At such time that commercial composting activity is discontinued at this site, the land shall be restored in accordance with a reclamation plan reviewed and approved by the Division of Building Inspection. The approved plan shall address the location and amount of soil to be replaced, final contours to be established, and type of vegetation to be planted and maintained.

Representation – Mr. Con Robinson, 4247 Georgetown Road, was present for his appeal. He said that this facility is not just for his composting operation, but he also lives at this address. He said that he was granted a conditional use permit back in 1990 for this property; but recently, he felt the need to create an all-weather site for his composting operation. In the winter, he found that he could not work in the windrow method because weather conditions were too wet. He said that he was still working within the area originally approved for his composting operation, but he had since lowered the elevation of his site. He had constructed a retention basin on one end of the property, as required by the Division of Engineering. On the other end of the site, he installed a grass berm to control the drainage. He said that he wanted to be a good neighbor, and did not want to create any problems for them. He believed that he was doing everything correctly, but he said he was also open to any suggestions that the Board members might offer him.

Mr. Robinson said that he had been giving away this rock and material, but it had come to the point where he felt the need to crush some of the material so that he could finish the site. He had material available for anyone that wanted it.

Questions – Ms. Meyer said that, in the staff report, it was noted that the other local composting operations had concrete pads. Mr. Robinson agreed that was the case. Ms. Meyer asked why he chose a different route to create a flat surface, as opposed to grading and installing concrete. Mr. Robinson said that he was processing rock, whereas the other two facilities were different. One, on city-owned property, had federal money to install the concrete pad. The other, right next to it, was on a 25-acre site where they could work year-round. He said that he was the first locally to compost material, and he couldn't work in the winter due to dirt and mud.

Ms. Meyer asked if a concrete pad would have allowed him to operate. He said that he could not afford to provide that amount of concrete on 22 acres. He said that when he first started, he used a windrow method; and now, through the use of technology, he relied upon a tub grinder and a large conveyor. This allowed him to have the material in a confined area because he couldn't get in his fields in the winter. He said that he was operating in the same area, but he had lowered the elevation of the area.

Ms. Meyer said that there was a substantial amount of rock that had already left this site. Mr. Robinson replied that he didn't need a mining or quarrying permit, as he could have given away the rest of the rock material. He wanted to finish the site, so he purchased a rock crusher so that he could create his all-weather site.

Objections – Mr. Don Todd, 145 Market Street, said that he was an attorney representing Bill & Beth Wofford, and 18 neighbors in the vicinity or adjacent to this location who are opposed to this application seeking an expansion of the composting permit. Mr. Todd provided the Board with a file folder containing several exhibits, and included suggested Findings of Fact, the 1990 minutes wherein the Board originally approved this composting operation, and a copy of the Zoning Ordinance (Article 8-1) pertaining to agricultural uses. He said that 18 letters were also included, four of which were from realtors commenting on the adverse impacts of the proposed use upon surrounding properties.

Mr. Todd opined that Mr. Robinson has a bad habit of asking for forgiveness instead of asking for permission. In 1990, the Board was told that he had been operating a composting operation since 1988. The Board disapproved that request, and it went through a lengthy litigation. Mr. Todd said that he was the 12th District Councilmember at that time, and that Board of Adjustment member Gloria Martin was the chair of a committee to review composting uses. That committee met for several months, as at that time, composting was only permitted in industrial zones on a concrete pad. Mr. Robinson suggested that he be permitted to conduct this use in the rural area. Mr. Todd said that the current provisions of Article 8-1(d)(6) led to the resolution of the litigation for this property. He reviewed the language of that section of the Ordinance with the Board members at this time.

Mr. Todd said that the open windrow method was the only type of composting permitted in the rural area. He displayed a photograph of the static windrow method for composting material outdoors. He said that the muck contains straw and that it was placed in rows until a machine turns the material, leaving it in rows. Air breaks down the product, and it was ultimately sold, once its processing concluded. The Ordinance had allowed this method for composting for the past 20 years.

Mr. Todd then displayed a photo of the subject property. He said that Mr. Robinson had not had any muck on this farm for the past three years. Mr. Todd said that, instead, a steam shovel was on the property, and that Mr. Robinson had been operating a quarry on the property during this time period, in violation of city ordinances. Another photo was displayed showing an 18' highwall where the rock had been mined and material was stored, awaiting its sale. A third photo displayed a hoeram on the site, which Mr. Todd said was used to break up rock so that it can be processed. The photo also showed storage facilities for the material. A fuel storage facility was also shown to be on the property. He said that there had also been blasting conducted at this location in the past.

Mr. Todd displayed two aerial photographs to the Board, one from 2007 and the other from 2010. The 2007 photo indicated that there was an active, on-going rock processing operation on the site, and no muck storage. The 2010 photograph showed an expansion of the operation, the addition of the rock storage facilities, and trucks filled with rock, ready for transport. Mr. Todd said that there were no muck windrows on the site. It was his contention, that for some period of time, the site had not been operating as it had originally been permitted to do so, and was now operating as a quarry, but without the proper state or local permits. He said that this had damaged the surrounding properties, and was not in the spirit or intent of the Zoning Ordinance.

Mr. Todd said that he had visited the site yesterday, and provided a copy of the Mining & Quarrying Ordinance with some of the sections highlighted. He said that this ordinance requires the site to be restored once it closed, under a Reclamation Plan with an appropriate bond or other surety; and he said other sections were pertinent for the Board's review. Groundwater studies were also required for this use, but none had been submitted thus far.

Mr. Todd provided another photograph, this one of muck processing machinery that had grass growing up around it. He said that neighbors would testify that this equipment had not been used in several years.

Mr. Todd said that the staff report opined that a temporary quarrying operation would be appropriate at this location. He said that there was no such provision allowable under the Zoning Ordinance. He was not sure if that meant that certain provisions of the Mining & Quarrying Ordinance could be waived or not, but he did not believe that the Board of Adjustment could approve a temporary quarrying operation at this location. He said that the staff noted that they could support this request due to the winter weather conditions and the fact that there would be more difficult processing of the material during that time of year. He said that Keeneland does not run races during the winter, and that there are usually fewer horses here then than during other times of year.

Mr. Todd said that the windrow method was meant to use the natural topography and that there were issues about the impact of the current use upon water quality. He said that, while this farm was not in the Royal Spring Aquifer Recharge Area, it was located close to it, according to the information provided in the objector's packet. Clearly, the subject property was adjacent to it.

Mr. Todd said some blasting had occurred. He had hoped that the neighbors would provide that information to the Board at this time, and how it had affected the enjoyment of their property. He said Mr. Mike Owens was also present to speak on this issue.

Mr. Mike Owens, 3184 Newtown Pike, was present to oppose this application. Mr. Owens said he owns a

25-acre farm where he boards horses and raises hay and manages a 300+ acre thoroughbred farm. He said he had lived on the north end of Lexington for the past 39 years. He viewed this site three years ago, and had dealings with many of the adjoining farm owners. He said he had done business with Mr. Robinson in the past, and had no problem with his composting business, as he had purchased top soil from him in the past. Mr. Owens reminded the Board that agricultural lands are for raising commodities. He saw an inconsistency with the removal of dirt and rock from this location. He thought that less than 10% of Mr. Robinson's operation was related to composting. He said mining and quarrying was the activity that has been on-going at this location, as various layers of rock had already been removed from this site.

Mr. Owens said he understood that Mr. Robinson needed a concrete pad to process his compost, but he asked how deep he would dig to create that pad. It appeared to him that excavations had been almost 20' deep in some locations. He said he had already mined enough rock to create his own concrete pad, as he had all the material. He wondered how the expense of the rock crushing machine could be justified if the material was being given away, up to this point. He said there were photos shown of many pieces of machinery on the site, all of which have operating costs. He wondered how composting could be covering these costs, if composting was only comprising 10% of the site's current activity.

Mr. Owens commented on the conditions given to the Board for the approval of this use, saying the quarrying activity was to be permitted for two years. He wondered how deep into the ground he would be at that point in time. He felt Mr. Robinson should move the material out onto the farm in order to create the pad that was needed. He commented on condition #5, and wondered how the site could be restored. He said this was Fayette County's version of mountaintop removal, and he was unsure as to how this land could be reclaimed. He said he was losing a good source of topsoil, but said this use should not have been allowed; and that this was an instance where the appellant had been "caught with his hand in the cookie jar," but, he was now trying to make things right.

Mr. Owens commented on the photo of the 505 Farm's composting operation shown earlier by Mr. Todd. He said they turn the material on a near-daily basis, and that was proof that composting can take place on dirt. He said Mr. Robinson has, instead, a mining operation. For that reason, he urged the Board to deny this request, and he thanked them for their time.

Mr. Bill Wofford, 4175 Kearney Road, spoke in opposition. He said he had resided at this address since 1972, and that he was employed full time in the horse business. He described a trip to the Planning office a few years ago where he was interested in purchasing additional land in this area. He was told that the entire area was agricultural, and that there were no industrial or commercial land uses in this vicinity. As a result, he bought the land.

Mr. Wofford said he started having problems about three years ago. He said the pictures in his home were moving, and came to realize that Mr. Robinson was blasting rock. He said he called Frankfort and learned that Mr. Robinson did not have a permit for the blasting activity. He had since noticed that there were some cracks in his home's foundation and in the brick on his garage, noting there were none there for the first 20 years he owned it. He concluded it was from Mr. Robinson's blasting activities.

Mr. Wofford said noise had also been a problem. He said he observed metal buildings being dismantled for 8-9 hours a day on the site. He said that since the notice letters for this hearing had been mailed, all the metal that had been on the site had since been removed. He also observed trucks entering and leaving this property with the metal. He said he gallops and breaks racehorses on his farm right next to the subject property. He said if there was an explosion there, it would be a big problem for him; and he wondered if his liability insurance would cover an injury to one of his riders if a horse was spooked by something next door.

Mr. Wofford said dust was also a problem, as it gets on vehicles. He said that since 1972, he had also planted more than 500 bushes and plants on his property. He said he had pine trees along the property line, and about 75% of them died, so he asked the nurseryman to come out and look at them. He was then told that they were covered in limestone, and the trees responded as if they had been painted. The only way they could have survived was if they had been sprayed with water, so that the limestone dust could not settle on them.

Mr. Wofford said he had a realtor explain the impact of this facility upon his property. He was told the pounding of limestone on the adjacent property would have an impact upon his farm, and he told the Board that there were four letters from realtors in the Board's exhibit notebook. He wondered about the future of the Robinson property, if it were to sell in the near future. He opined that the flat platform could

have been made with a four-foot excavation rather than the 20' of material that had been removed. Mr. Wofford closed by saying that Mr. Robinson had made his living off his farm and that now, it was being ruined.

Ms. Cathy Armstrong, 4149 Georgetown Road, was present to object. She said she was one property removed from Mr. Robinson's farm, and she wished to speak as a concerned citizen. She said the machines excavating rock from this site were visible from her property, and she confirmed that they were noisy. She said that the dust was an unbelievable problem. She said she had two horses with respiratory problems as a result of the dust, with a condition similar to chronic bronchitis. She said if the excavations were to reach the aquifer, then it would mean the installation of a \$10K water line for their farm, as they currently use well water.

Mr. Todd said that when composting was contemplated in the 1980s, it was the windrow method that was envisioned. He said no reasonable person would have anticipated the amount of rock being removed under the ordinance that permits composting as a conditional use. He said the farmland surrounding this site was valuable to those property owners, as had been described at this hearing. He asked how this property could be reclaimed. He said there were issues about pollution and storm water runoff, and that his clients did not want to see this property "become worse" or to see this type of activity in other parts of the county. Mr. Todd said Mr. Wofford breaks two-year old horses, and does not need the negative impacts of this use upon his farm.

Mr. Todd said that in 1988, when this land use began initially, Mr. Robinson was operating without a permit. That led to the creation of the section of the Zoning Ordinance that permits this use. The 1990 BOA minutes indicate that the only noise will be from farm machinery, while the photographs show that that machinery approved then was not now being used. He said the proper route would have been to have filed for the various permits necessary with the state, and had the proper studies performed. He felt that this use was a travesty, and that this issue needed to be resolved at some point in time.

Appellant's Rebuttal – Mr. Robinson said that he had been granted a grading permit two years ago by the Division of Engineering. They stipulated in that permit how the berm area and detention areas were required to be treated in the front of the excavated land. He said that he constructed the dam they requested, and he remained in compliance with that requirement. He said he had not been digging any "holes" in his land, and that he welcomed visitors to his site. He said he was in the topsoil business, and that he hates rock. He was trying to finish this work, and there currently was an abundance of dirt available in Lexington. He said he wanted to stay in the compost business, and repeated that he was in compliance with the terms of his grading permit. He said he had been subject to inspections twice each month for the past two years, and he was proud to say he had never received any Notices of Violation.

Mr. Robinson mentioned the photo shown earlier of the composter sitting idle on his site. He said he had hauled muck and other material onto the site "all the time" over the past two years. He said the windrow method took up to 12 weeks to process the material into topsoil. However, a 14' wide tub grinder with an 860 horsepower engine can process the material with only one pass. He said that, with this technology, he can utilize the static pile method of composting, utilizing a 100' conveyor. He said everyone knows that you can't drive out in the middle of a field when it is wet.

As to the horse operation next to his property, Mr. Robinson said that on the other side, the Rood & Riddle Equine Hospital had between 30-40 horses out to pasture at any one time over the past two years. He had not received any complaints from them during that time period, and he sees those horses grazing everyday.

Mr. Robinson said that those that conduct blasting always set up seismographs to measure the vibrations. He said he had not conducted that much blasting at this location, but more accurately, had been "ripping the material out."

Discussion – Mr. Stumbo asked if a permit was required to conduct any blasting. Mr. Robinson replied that he had been giving away this material. Mr. Stumbo asked if he was selling any of the material. Mr. Robinson replied he had, but that he brings material onto the site as well, so that he would not run out. He processed the compost into custom blends and topsoil. He said most contractors not in the "dirt business" are more than happy to give away the material, and that there are dirt piles all over town.

Ms. Moore asked whether there were any adverse effects of his operation, given the testimony presented earlier to the Board. She asked the staff if they had any comments on this subject. Mr. Marx stated that, as this request was offered to the staff, it was to be an incidental use to the existing composting operation.

The question that first arose was why a Mining & Quarrying Permit was necessary for this use, if it was to be incidental to the 1990 permit that was issued. The answer was that it was because Mr. Robinson intended to sell some of the rock material that had been removed, which requires approval by the Board.

Ms. Moore said that the Board still needed to consider whether or not there were adverse impacts associated with this use. Mr. Marx agreed, but added that the staff advised Mr. Robinson that if he chose not to sell the material, then he wouldn't need this permit.

Mr. Robinson said he felt as if he had "opened up a can of worms" with this application. Still, he said he wanted to be legal and right in what he was doing, and that was why he made this application. He said that he had given away many loads of material, to churches, for the roundabout on Old Frankfort Pike, and to others that would remove it from this location. He did not want this material to be on his site for a long time, which was why he filed this request. He said that if someone asked if they could have all this material from his site, he would be thrilled to have them remove it and take it away for free.

Mr. Glover asked if Mr. Robinson had spoken with the staff about their recommended conditions. Mr. Robinson said he understood that he would need a State permit for even a temporary quarrying operation. He had been told the State would issue one, following approval from the City of his current application. Mr. Glover asked if the State had assured him they would issue the temporary permit. Mr. Robinson replied yes, once he obtained approval from the City. Mr. Glover asked if a reclamation bond would be required by the State. Mr. Robinson replied that he told them that he desires a flat site, with a big, beautiful lake in the back of the property. He said that he had supplied a grading plan, and was working toward implementing that plan. Mr. Glover said that he was not confident that he could obtain a permit for this operation from the Kentucky Department of Mining & Minerals, and asked if he had spoken with that agency. He replied affirmatively, and said that they would issue him a permit if he obtained a temporary approval from the City. He was told that was all he had to do.

Mr. Wofford responded that on the last page of the objector's exhibit packet, Rood & Riddle signed the petition in opposition to this request. He said that they were anxious to sign the petition because they did not like what was happening on this property. He said that Hurricane Hall Farm, with 400 acres, also was anxious to sign the petition as well. He said that one other issue that had not been addressed was the recycling of metal that had occurred on this property. He did not want to see this property become commercial in nature. He said he observed loud machinery pounding the rock while he was outdoors riding, as well. He said that horses' hearing was generally five to six times better than for humans' hearing, and the people operating the equipment use personal protection devices. He said this use was far from agricultural in character. He said the Horse Park was using the Creech composting operation for their muck, and that was why Mr. Robinson was transitioning to a rock and metal materials business instead of his past composting operation.

Mr. Todd said the issue with this use was that Mr. Robinson was mining rock, and it was no longer a composting operation. He said one couldn't remove that much rock and topsoil in support of composting muck. He concluded that the appellant was conducting a mining operation on this property, and it was not the first time he had operated without the proper permits in hand. He asked the Board to deny this application.

Mr. Robinson responded there was finished compost available on the site, and that he has provided the City with custom compost blends for rain gardens and other projects. He said this was the type of business he conducts. He said anyone can come to this site and view the "beautiful compost" that he had available.

Mr. Glover asked the staff if they had envisioned this operation, and if they were in agreement that it would conclude by the end of 2012. Mr. Hume replied that the duration of the operation was up to Mr. Robinson. He also said there had been compost on this site, either processed or "in process" material, when inspections had been conducted. Mr. Hume said he and Mr. Robinson had communicated well every time an issue had arisen about his operation. He said Mr. Robinson approached Building Inspection two years ago when the grading for this concrete pad was envisioned for the approved 22-acre composting area. He said his office referred him to the Division of Engineering, which issued a grading permit for this activity. He said most people would say that it was unfortunate it was in the middle of an area of horse farms, and that was true enough; but he felt Mr. Robinson had been operating legally over the past two years.

Mr. Hume said the only "hair-splitter" type of issue was how the material was being disposed of, and that the sale of the material does allow one to call this a mining operation. He felt that if Mr. Robinson was

giving away the material, then that would not have been the case. Mr. Hume said that Mr. Robinson had provided all of the blasting permits and all of the water quality permits, and that he had been to Frankfort a number of times to fulfill their requirements. He could not recall one occasion where Mr. Robinson tried to circumvent a requirement of Building inspection.

Mr. Glover asked if a grading permit allowed Mr. Robinson to quarry rock. Mr. Hume replied that a grading permit did allow Mr. Robinson to change the topography of his land.

Mr. Todd said that when Mr. Robinson first was permitted to process compost at this location, it was under the windrow method. He said Building Inspection does not have the authority to interpret that a grading permit allowed him to mine millions of tons of rock. Such an activity was never contemplated, and Mr. Hume's interpretation was "his own." Mr. Todd said Mr. Robinson was given the opportunity to compost with the windrow method on a field, but the photos shown today do not indicate that that was occurring there now. He said that the appellant had mined millions of tons of rock off the field and sold it, and asked where the topsoil was located on this property.

Mr. Todd opined that Mr. Robinson had been operating a commercial operation at this location for years, contrary to his approved conditional use permit, and had been allowed to do so. This activity had adversely affected the horse farms surrounding this property, and was in violation of the Agricultural Rural zone requirements. Mr. Todd said Mr. Robinson was not authorized to make that decision, but that either the Board or the courts were. Mr. Todd said he was worried by Mr. Hume's interpretation, especially in regard to the "next guy" that might file a similar application, and wants to do the same thing. That would result in quarries all over Fayette County, and that such a result would be contrary to the Comprehensive Plan, the Purchase of Development Rights program, and everything that had been worked for by so many.

Mr. Griggs asked if the grading permit had any indication as to the proposed elevations. He said that upon his visit to the site, he was shocked at the scope of the elevation changes. He said he could understand removing a few feet of the topsoil to get to a rock layer where the compost could be processed; but given the depth of rock that had been removed, he couldn't help but wonder if this was shown at the time the grading permit was sought. Mr. Hume said that Mr. Barry Brock reviewed that grading permit application prior to his retirement from the LFUCG Division of Engineering. Mr. Marx replied that the staff did have a copy of the grading permit, and that the 20' drop in elevation was contemplated at the time the grading permit was sought. Mr. Griggs said that, although it was sad, it appeared that the work done was in compliance with that permit. Mr. Todd objected, saying that the Zoning Ordinance doesn't allow for this, and that someone "just decided" it could be done.

Ms. Moore said it appeared that this was the result of a mistake, and now Mr. Robinson was quarrying rock. It didn't matter to her that Mr. Robinson had a grading permit, because now he was mining rock.

Mr. Griggs said that the lion's share of the damage here had already occurred. He would like to make sure the site could be restored when Mr. Robinson closed his business here, or sooner. He wondered if it was better to halt this operation now when it was a jagged mess, or revise the grading permit to taper the site so that it can be useable without doing any more damage. Mr. Hume responded that if the Board were to approve the quarrying permit, then Mr. Robinson would be held to the reclamation standards and to the inspection standards done for all quarries. He felt that he would be held to the same standards that folks are concerned about.

Mr. Griggs asked Mr. Todd which route the objectors would prefer. Mr. Todd replied that he hoped that the appellant would be stopped now, and that only part of the issue with this property was the removal of the rock. Of equal importance was the adverse impact this activity had upon the surrounding property owners. This activity was clearly having an effect upon the agricultural operations in this surrounding area, and Mr. Todd urged the Board to halt that impact as well.

Mr. Glover asked if there was another quarry currently operating in this area. Mr. Todd said that there was one nearby. Mr. Hume agreed, saying that Vulcan Materials was reopening their quarry, and had been to the Board within the past year or so to permit an expansion of that facility. Mr. Todd said that the point was that there were already enough suppliers of rock in our area, and that there was no need for more.

Mr. Glover asked if this mining activity would be appropriate in some other location. Mr. Todd replied that the application process would determine that answer, based upon the impacts to ground water and other adverse impacts. He said Mr. Robinson had "bootlegged" this use, and that there had not been any real review of it and no reclamation bond had been posted either. He said he wasn't sure that the Board could

require a bond for the activity at this point in time.

Mr. Glover asked if this conditional use permit was denied, then what would happen on this site. Mr. Todd replied that if the application was denied, the surrounding neighbors would be spared from the continuation of an ongoing quarrying operation. Then, Mr. Robinson would have to make a determination about how he would use that land. He wondered why the Board would reward someone who initially violated the premise of the process. He encouraged the Board not to do so. He thought that Mr. Robinson should have to adhere to the same rules that apply to Vulcan, or any other quarry operator. He said it was not fair for the Board to approve this request to "get him in line." Instead, he asked the Board to stop this activity and give the neighbors a chance to conduct their agricultural operations.

Mr. Glover asked Mr. Todd if he thought the appellant could adhere to the recommended conditions. Mr. Todd said that he was unsure, as he was not a mining engineer. However, he did believe that the appellant should have never begun this operation until he had filed the correct paperwork in Frankfort to conduct this activity, and should have asked the Board to authorize this use. He said this operation had been ongoing for three years and that no one knew of the activity until the satellite photos confirmed it.

Ms. Moore asked Ms. Boland for her comments. Ms. Boland replied that the Board needed to consider that in order to approve an application for a conditional use permit, there had to be a finding that "the proposed use would not have an adverse influence on existing or future development of the subject property or its surrounding neighborhood." The purpose of a conditional use permit was not to solve something that was wrong to begin with. She said that the Board had to find that allowing a quarrying operation at this site will not have an adverse impact on the subject or surrounding property.

Action – A motion was made by Ms. Meyer, and was seconded by Mr. Griggs, to disapprove **C-2010-99: CON ROBINSON** – an appeal for a conditional use permit to conduct a temporary mining and quarrying operation to improve an existing composting site in the Agricultural Rural (A-R) zone, on property located at 4247 Georgetown Road, for the following reasons:

1. Granting the requested conditional use permit for a quarrying operation in the midst of prime agricultural land, currently engaged in active agricultural use - primarily as equine operations, would adversely impact both the subject and surrounding properties.
2. The noise and heavy machinery associated with a quarrying operation, as well as the dust generated, are not appropriate in this prime agricultural area, and would directly impact the surrounding agricultural operations.

The votes on the motion were as follows:

Ayes: Griggs, Meyer, Moore, Stumbo

Abstained: Glover

Absent: Stout, White

The motion for disapproval carried.

Discussion – Mr. Glover wished to explain his abstention, as he was concerned about the future of this property. He said that he hated to see "an open sore" in the middle of an area of prime farmland. He wasn't sure that denying this request would result in anything other than a continuation of the status quo.

Mr. Hume said that this would not halt the activity conducted under the approved grading permit. Mr. Glover said that he understood that scenario. Mr. Todd said that the courts would ultimately have to decide that issue. Mr. Glover said that he anticipated a lawsuit, with which Mr. Todd agreed.

Mr. Robinson said that he had a grading permit and asked if he would be permitted to give away the material. Ms. Meyer said that the Board had made their decision, and that issue would need to be addressed at the next level.

IV. **BOARD ITEMS** - The Vice-Chair announced that any item a Board member wished to present would be heard at this time. There were none offered.

V. **STAFF ITEMS** - The Vice-Chair announced that any item a Staff member wished to present would be heard at this

time.

- A. 2011 Meeting and Filing Schedule – Mr. Sallee stated that the staff had distributed draft copies of the Meeting and Filing Schedule for 2011, so that it could be presented for review and/or adoption at next month's meeting.
- B. HB 55 Training Opportunity – Mr. Sallee announced that there would be an APA audio conference on Wednesday, November 10, beginning at 4:00 p.m. in the Division of Planning (Phoenix Building, 7th floor) conference room. The title of this audio conference was "Regulating Controversial Uses," and would count toward 1.5 hours of training credit for Board of Adjustment members and staff.

VI. **NEXT MEETING DATE** - The agenda identified that, due to the Thanksgiving holiday, the next meeting date would be November 19, 2010, which would be one week earlier than usual.

VII. **ADJOURNMENT** - There was no further business, so the Vice-Chair declared the meeting adjourned at 6:58 PM.

Louis Stout, Chairman

James Griggs, Secretary